Supreme Court, U.S.

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the need for "biodiversity" and the possibility that benefits may some day flow from that biodiversity constitute a substantial effect on interstate commerce under the Commerce Clause so as to allow the federal government to protect the habitat of a fly, which is found only within an eight mile radius in the middle of southern California and which does not move among the states on its own or through human agency, through the criminal sanctions contained in the Endangered Species Act, 16 U.S.C. §§ 1531, *et seq.*?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in this Court are, and in the United States Court of Appeals for the District of Columbia were, the National Association of Home Builders of the United States, the Building Industry Legal Defense Foundation, the County of San Bernardino, California, the Cities of Colton and Fontana, California, Bruce Babbitt, Secretary of the Department of the Interior, and Mollie Beattie, Director of the United States Fish and Wildlife Service.

The National Association of Home Builders of the United States, a not-for-profit corporation, has neither a parent company nor any non-wholly owned subsidiaries.

The Building Industry Legal Defense Foundation, a not-for-profit corporation, is a wholly owned subsidiary of the Building Industry Association of southern California. The Building Industry Legal Defense Foundation has no subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING CERTIORARI 4

A. The Circuits Cannot Agree On The Meaning Of *Lopez* 6

1. The District of Columbia Circuit 6
2. The Fourth Circuit 6
3. The Ninth Circuit 7
4. The Eleventh Circuit 7

B. Circuit Judges Cannot Agree Between Themselves On The Meaning Of *Lopez* 7

1. The District of Columbia Circuit 7
2. The Third Circuit 9
3. The Fourth Circuit 10

TABLE OF CONTENTS (Cont.)

Page

4. The Fifth Circuit 11
5. The Sixth Circuit. 12
6. The Seventh Circuit 12

C. Courts Of Appeals And District Courts Cannot Agree On The Meaning Of *Lopez* 13

1. The Third Circuit 13
2. The Fourth Circuit 13
3. The Fifth Circuit 14
4. The Seventh Circuit 14
5. The Eighth Circuit 14
6. The Ninth Circuit 14
7. The Eleventh Circuit 15

CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

CASES

Brzonkala v. Virginia Polytechnic Institute and State University,
132 F.3d 949 (4th Cir. 1997) 10, 13

Cargill, Inc. v. United States,
- U.S. -, 116 S.Ct. 407 (1995) 16

Hoffman v. Hunt,
126 F.3d 575 (4th Cir. 1997) 13-14

National Association of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) ..... *passim*

National Association of Home Builders v. Babbitt,
949 F.Supp. 1 (D.D.C. 1996) 1

United States v. Bailey,
115 F.3d 1222 (5th Cir.),
reh'g en banc denied, 127 F.3d 36 (5th Cir. 1997),
cert. denied, - U.S. -, 118 S.Ct. 866 (1998) 11, 14

United States v. Beuckelaere,
91 F.3d 781 (6th Cir. 1996) 12

United States v. Bishop,
66 F.3d 569 (3d Cir.),
reh'g en banc denied, 73 F.3d 23 (3d Cir.),
cert. denied, - U.S. -, 116 S.Ct. 681 (1995) 9

TABLE OF AUTHORITIES

Page(s)

CASES (Cont.)

United States v. Chesney,
86 F.3d 564 (6th Cir. 1996),
cert. denied, - U.S. -, 117 S.Ct. 2470 (1997) 12

United States v. Davis,
93 F.3d 141 (4th Cir. 1996),
cert. denied, - U.S. -, 117 S.Ct. 1274 (1997) 10

United States v. Hebert,
131 F.3d 514 (5th Cir. 1997)..... 10

United States v. Kirk,
70 F.3d 791 (5th Cir. 1995), *reh'g*
en banc granted, 78 F.3d 160 (5th Cir. 1996),
aff'd by an equally divided en banc court,
105 F.3d 997 (5th Cir.), *cert. denied*, -
U.S. -, 118 S.Ct. 47 (1997) 11-12

United States v. Lopez,
514 U.S. 549 (1995) ..... *passim*

United States v. Miles,
122 F.3d 235 (5th Cir.),
reh'g en banc denied, sub nom. U.S. v. Gustus,
131 F.3d 142 (5th Cir. 1997) 11

TABLE OF AUTHORITIES

Page(s)

CASES (Cont.)

United States v. Mussari,
95 F.3d 787 (9th Cir. 1996), *cert. denied*,
- U.S. -, 117 S.Ct. 1567 (1997) 15

United States v. Nguyen,
117 F.3d 796 (5th Cir.), *cert.*
denied, - U.S. -, 118 S.Ct. 455 (1997) 11

United States v. Olin Corp.,
107 F.3d 1506 (11th Cir. 1997) 4, 15

United States v. Pappadopoulos,
64 F.3d 522 (9th Cir. 1995) 7

United States v. Parker,
108 F.3d 28 (3d Cir.), *cert. denied*,
- U.S. -, 118 S.Ct. 111 (1997) 13

United States v. Wilson,
133 F.3d 251 (4th Cir. 1997) 6-7, 10, 13

United States v. Wilson,
73 F.3d 675 (7th Cir. 1995), *cert. denied*,
- U.S. -, 117 S.Ct. 47 (1996) 12-13, 14

United States v. Woodruff,
122 F.3d 1185 (1997),
cert. denied, - U.S. -, 118 S.Ct. 866 (1998) 14

TABLE OF AUTHORITIES

Page(s)

CASES (Cont.)

United States v. Wright,
128 F.3d 1274 (8th Cir. 1997) 14

CONSTITUTIONS AND STATUTES

United States Constitution, Article I, § 8, cl. 3 1

Child Support Recovery Act of 1992,
18 U.S.C. § 228 ..... 11, 13, 14, 15

Clean Water Act, 33 U.S.C. §§ 1311, *et seq.* 6

Comprehensive Environmental Response,
Compensation, and Liability Act of 1980,
42 U.S.C. §§ 9601, *et seq.* 7

Comprehensive Environmental Response,
Compensation, and Liability Act of 1980,
42 U.S.C. §§ 9606(a) and 9607(a)(1)(A)
and (2)(A) 15

Endangered Species Act, § 3(19),
16 U.S.C. § 1532(19) 1-2

Endangered Species Act, § 9(a)(1),
16 U.S.C. § 1538(a)(1) 1

TABLE OF AUTHORITIES

Page(s)

CONSTITUTIONS AND STATUTES (Cont.)

Endangered Species Act, § 11(b)(1),
16 U.S.C. § 1540(b)(1) 2

Endangered Species Act, § 11(c),
16 U.S.C. § 1540(c) 2

Freedom of Access to Clinic Entrances Act of 1994,
18 U.S.C. § 24 ..... 12-13, 14

Hobbs Act, 18 U.S.C. § 1951(a) 10, 11, 14

Violence Against Women Act of 1994,
18 U.S.C. § 2262(a)(1) 14

Violence Against Women Act of 1994,
42 U.S.C. § 13981 ..... 10, 13

18 U.S.C. § 844(i) 7, 11

18 U.S.C. § 922(g)(1) 12

18 U.S.C. § 922(o) 12

18 U.S.C. § 2119 9

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

TABLE OF AUTHORITIES

Page

LAW REVIEW ARTICLES

Dwyer, The Commerce Clause and the Limits *of Congressional Authority to Regulate the Environment*, 25 Envtl. L.R. 10421 4-5

Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139 (1995) 5

Johnson, *United States v. Lopez: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. Envtl. L.J. 33 (1996) 5

Warner, *The Potential Impact of the United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. & Pol'y F. 321 (1997) 5

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia is reported at 949 F.Supp. 1 (D.D.C. 1996). A copy of the opinion is set forth in Appendix A. The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 130 F.3d 1041 (D.C. Cir. 1997). A copy of the opinion is set forth in Appendix B.

JURISDICTION

The decision of the United States Court of Appeals for the District of Columbia Circuit was entered on December 5, 1997. No rehearing was sought.

This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Article I, § 8, cl. 3, of the United States Constitution states: "The Congress shall have power ... [t]o regulate commerce ... among the several states, ..."

Section 9(a)(1) of the Endangered Species Act, 16 U.S.C. § 1538(a)(1), states: " [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to ... (B) take any such species within the United States or the territorial sea of the United States; ..."

Section 3(19) of the Endangered Species Act, 16 U.S.C.

§ 1532(19), states: "The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

Section 11(b)(1) of the Endangered Species Act, 16 U.S.C. § 1540(b)(1), states: "Any person who knowingly violates any provision of this chapter, ..., or of any regulation issued in order to implement subsection (a) (1) ... (B), ...of section 1528 of this title, shall, upon conviction, be fined not more than $50,000 or imprisoned for not more than one year, or both."

STATEMENT OF THE CASE

The plaintiffs filed their action in the District Court for the District of Columbia seeking a declaration that the application of § 9 of the Endangered Species Act (the "ESA") - which prohibits the "taking" (broadly defined) of endangered species - to the Delhi Sands Flower-loving Fly (the "Fly") exceeds the power of Congress under the Commerce Clause, and an injunction against its application to construction in areas containing the Fly's habitat. Jurisdiction was founded on 28 U.S.C. § 1331 and Section 11(c) of the ESA, 16 U.S.C. § 1540(c).

> "This dispute arose when the Fish and Wildlife Service ("FWS") placed the Fly, an insect that is native to the San Bernardino area of California, on the endangered species list. The listing of the Fly, the habitat of which is located entirely within an eight mile radius in southwestern San Bernardino County and northwestern Riverside County, California, forced San Bernardino County to

alter plans to construct a new hospital on a recently purchased site that the FWS had determined contained Fly habitat.[1] The FWS and San Bernardino County agreed on a plan that would allow the County to build a hospital and a power plant in the area designated as Fly habitat in return for modification of the construction plans and purchase and set aside of nearby land as Fly habitat. In November 1995, FWS issued a permit to allow construction of the power plant. During the same month, however, the County notified the FWS that it planned to redesign a nearby intersection to improve emergency vehicle access to the hospital. The FWS informed the County that expansion of the intersection as planned would likely lead to a 'taking' of the Fly in

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1 "The [FWS] has also impeded several localities from complying with County-mandated weed-control programs which are an integral part of preventing brush fires in the area. Construction planning and projects, including an electrical substation and housing developments, have also been threatened, impeded, or prohibited because of the Fly. Local land-use planning, including the authority to balance environmental concerns with development in a way to best serve citizens' interests, has been disrupted; the financial health of the local governments has been impacted; a local enterprise zone has been threatened; and private land development has been impeded." 130 F.3d at 1060 (Sentelle, J., dissenting).

> violation of ESA section 9(a). After brief, unsuccessful negotiations between the County and FWS, the County filed suit in district court challenging the application of section 9(a)(1) to the Fly.
>
> "The district court held that application of section 9(a)(1) of the Endangered Species Act to the Fly is a valid exercise of Congress' power pursuant to the Commerce Clause. Accordingly, the court entered summary judgment on behalf of the government." 130 F.3d at 1043.

The plaintiffs contended, both before the district court and the Court of Appeals, that the application of the taking prohibition contained in the Endangered Species Act to the Fly - inhabiting, as it does, a 40 square mile area in the middle of Southern California and lacking any economic significance whatsoever - was beyond the power granted to Congress under the Commerce Clause as interpreted by this Court in *United States v. Lopez*, 514 U.S. 549 (1995). Both courts rejected the argument and held in favor of the government.

REASONS FOR GRANTING CERTIORARI

Commentators quickly recognized that this Court's decision in *Lopez* could have a substantial impact on the application of legislation dealing with the regulation of the environment. *See, e.g.*, Dwyer, *The Commerce Clause and the Limits of Congressional Authority to Regulate the Environment*, 25 Envtl. L.R. 10421, 10428 and 10429-

10430 (1995)(Endangered Species Act is vulnerable under *Lopez*); Holman, *After United States v. Lopez: Can the Clean Water Act and the Endangered Species Act Survive Commerce Clause Attack?*, 15 Va. Envtl. L.J. 139 (1995); Johnson, *United States v. Lopez: A Misstep, But Hardly Epochal for Federal Environmental Regulation*, 5 N.Y.U. Envtl. L.J. 33, 42 (1996)(the success or failure of attacks on the Endangered Species Act and the Clean Water Act "depends heavily on whether *Lopez* is an aberration or the beginning of a trend moving away from the Court's traditional deferential Commerce Clause review"); and Warner, *The Potential Impact of the United States v. Lopez on Environmental Regulation*, 7 Duke Envtl. L. & Pol'y F. 321 (1997)(vulnerability of the application of the Endangered Species Act and the Clean Water Act in light of *Lopez*). As commentators often do, they argued both sides of the question without reaching any firm conclusions.

The case at bar arises in the context of federal environmental regulation but its implications go much beyond the Fly and its southern California habitat. It provides a vehicle for this Court to explain *Lopez* and its reach. The judges of the lower federal courts need this Court's guidance because they, like the commentators cited above, haven't been able to come to any consistent understanding of where the limits of Congress's Commerce Clause authority are, whether in the environmental realm or elsewhere. Put simply, they haven't the foggiest idea what this Court meant when it decided *Lopez*. There is disagreement between Courts of Appeals; there is disagreement between judges on individual panels of Courts of Appeals; and there is disagreement between the judges of the district courts and those of their Courts of Appeals.

Thumbnail descriptions of a number of cases will show just how widespread these disagreements are.

A. The Circuits Cannot Agree On The Meaning Of *Lopez*

1. The District of Columbia Circuit

The majority below held that the Commerce Clause provided Congress with the authority it needed in order to protect the Fly under the Endangered Species Act, notwithstanding the fact that it was found in an extremely limited area in the middle of one state. The majority held that the substantial effect on interstate commerce required under *Lopez* could be analyzed in terms of endangered species generally rather than with respect to the Fly specifically, *i.e.*, the majority never addressed Fly-specific issues which would demonstrate that the loss of the Fly (as opposed to any other endangered species) could have a substantial effect on interstate commerce. (130 F.3d at 1052-1055 (Wald, J.) and 1058-1059 (Henderson, J., concurring).)

2. The Fourth Circuit

In *United States v. Wilson*, 133 F.3d 251 (4th Cir. 1997), the Court of Appeals held that the Army Corps of Engineers did not have authority under the Clean Water Act, 33 U.S.C. §§ 1311, *et seq.*, to regulate the draining and filling of isolated wetlands in light of *Lopez*, precisely in order to avoid a constitutional adjudication because this Court's "recent federalis`m jurisprudence" had drawn the extent of Congress's power to regulate isolated wetlands into question. (133 F.3d at 256.) The court noted that the

regulation purported to extend the reach of the Clean Water Act solely on the basis of activities which "could" affect interstate commerce. (*Id.*)

3. The Ninth Circuit

In *United States v. Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995), the Court of Appeals held that the government had failed to bear its burden under *Lopez* of showing that the burning down of a private residence had a substantial effect on interstate commerce and therefore reversed an arson conviction under 18 U.S.C. § 844(i). In doing so, the court stated that the determination of whether the effect on interstate commerce was substantial had to be evaluated on a case-by-case basis. (64 F.3d at 527.)

4. The Eleventh Circuit

In *United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997), the Court of Appeals held that the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9601, *et seq.*, allowed criminal prosecution of a polluter even though the contamination "remains localized to Olin's site." (107 F.3d at 1508.) It was enough that the regulation of on-site hazardous waste disposal was part of a broader scheme "to protect interstate commerce and industries thereof from pollution." (107 F.3d at 1511.)

B. Circuit Judges Cannot Agree Between Themselves On The Meaning Of *Lopez*

1. The District of Columbia Circuit

The case at bar is a perfect example of the problems that the judges of the lower federal courts are having in

trying to understand just how they are to interpret the Commerce Clause in light of *Lopez*.

Two of the three Circuit Judges found that the application of the taking prohibition of the Endangered Species Act was justified under the Commerce Clause as interpreted by this Court in *Lopez*. (130 F.3d 1043-1057 (Wald, J.) and 1057-1060 (Henderson, J., concurring).) The remaining Circuit Judge dissented in light of *Lopez*. (130 F.3d at 1060-1067 (Sentelle, J., dissenting).)

All three of the judges in the Court of Appeals agreed that this Court had identified "three broad categories of activity that Congress may regulate under its commerce power." *Lopez, supra*, 514 U.S. at 558. Judges Wald and Sentelle agreed that the second category - the regulation and protection of the instrumentalities of interstate commerce or persons or things in interstate commerce - did not apply. (130 F.3d at 1046 (Wald, J.) and 1062 (Sentelle, J., dissenting).) Judge Henderson did not mention the second category in her concurring opinion. (130 F.3d at 1057-1060.) However, that was the end of their agreement.

Judge Wald held that the protection of the Fly was justified under the first category - regulation of the use of the channels of interstate commerce. (130 F.2d at 1046-1049.) Judges Henderson and Sentelle disagreed. (130 F.3d at 1057-1058 (Henderson, J., concurring) and 1062 (Sentelle, J., dissenting).)

Judges Wald and Henderson agreed that the protection of the Fly was justified under the third category - the regulation of activities having a substantial relation to interstate commerce. (130 F.3d at 1049-1057 (Wald, J.) and 1058-1060 (Henderson, J., concurring).) Judge Sentelle disagreed. (130 F.3d at 1063-1067.) However, Judges Wald and Henderson disagreed on the rationale behind the application of the third category. Judge Wald held that the possibility of commercial benefit in the future justified the application of the Endangered Species Act (130 F.3d at 1052-1054) and that the protection avoided destructive interstate competition. (130 F.3d at 1054-1057.) On the other hand, Judge Henderson held that the third category applied because "the loss of biodiversity by itself has a substantial effect on our ecosystem and likewise on interstate commerce." (130 F.3d at 1058 (footnote omitted).)

The case at bar does not stand alone; twelve different cases in five other federal circuits have resulted in split opinions when it comes to the application of *Lopez*.

2. The Third Circuit

In *United States v. Bishop*, 66 F.3d 569 (3d Cir. 1995), *reh'g en banc denied*, 73 F.3d 23 (3d Cir.), *cert. denied*, - U.S. -, 116 S.Ct. 681 (1995) the majority held that Congress had the authority under the Commerce Clause to enact 18 U.S.C. § 2119 to make carjacking a federal crime. Judge Becker dissented in light of *Lopez*. (66 F.3d at 590-603.)

3. The Fourth Circuit

In *Brzonkala v. Virginia Polytechnic Institute and State University*, 132 F.3d 950 (4th Cir. 1997), the majority held that Congress had authority under the Commerce Clause to enact the Violence Against Women Act of 1994, 42 U.S.C. § 13981. Judge Luttig dissented in light of *Lopez*. (132 F.3d at 974-978.)

As noted above, the Court of Appeals held in *United States v. Wilson* that a federal regulation was invalid in its definition of what constituted "the waters of the United States" in order to avoid the necessity of questioning the authority of the Congress to regulate isolated wetlands under the Commerce Clause. Judge Luttig concurred only in the judgment because he felt bound by the court's decision in *Brzonkala*. (133 F.3d at 266.)

In *United States v. Davis*, 93 F.3d 141 (4th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 1274 (1997), the Court of Appeals upheld the conviction of a defendant accused of fire bombing a house. Judge Doumar concurred but stated that federal jurisdiction was a close question under *Lopez*. (98 F.3d at 146-147.)

4. The Fifth Circuit

In *United States v. Hebert*, 131 F.3d 514 (5th Cir. 1997), the majority refused to even consider an attack on the Hobbs Act, 18 U.S.C. § 1951(a), on the ground that Congress had exceeded its authority under the Commerce Clause because of earlier decisions on the subject. Judge DeMoss dissented in light of *Lopez*. (131 F.3d at 528-530.)

In *United States v. Miles*, 122 F.3d 235 (5th Cir.), *reh'g en banc denied sub nom. U.S. v. Gustus*, 131 F.3d 142 (5th Cir. 1997), the Court of Appeals, in a per curiam decision, held that the Hobbs Act was constitutional both on its face and as applied. Judge DeMoss specially concurred on the ground that the court was bound by a prior decision of the court which had upheld the constitutionality of the Hobbs Act against an attack under *Lopez*. Nevertheless, he found himself "in such fundamental disagreement" that he felt the necessity of registering his contrary viewpoint. (122 F.3d at 241.)

In *United States v. Nguyen*, 117 F.3d 796 (5th Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 455 (1997), the majority upheld the authority of Congress to make arson a federal crime under 18 U.S.C. § 844(i). Judge Jones dissented in light of *Lopez*. (117 F.3d at 798-800.)

In *United States v. Bailey*, 115 F.3d 1222 (5th Cir.), *reh'g en banc denied*, 127 F.3d 36 (5th Cir. 1997), *cert. denied*, - U.S. -, 118 S.Ct. 866 (1998), the majority held that Congress had the authority under the Commerce Clause to enact the Child Support Recovery Act, 18 U.S.C. § 228. Judge Smith dissented in light of *Lopez*. (115 F.3d at 1233-1240.)

In *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), *reh'g en banc granted*, 78 F.3d 160 (5th Cir. 1996), *aff'd by an equally divided en banc court*, 105 F.3d 997 (5th Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 47 (1997), the majority held that Congress had the authority under the Commerce Clause to make the possession of a machine gun a federal crime

under 18 U.S.C. § 922(o). Judge Jones, as a member of the panel which originally decided *Kirk*, dissented in light of *Lopez*. (70 F.3d at 798-802.) She was joined by Judges Garwood, Jolly, Smith, Barksdale, Garza and DeMoss when the matter was heard en banc. (105 F.3d at 1005-1013.)

5. The Sixth Circuit.

In *United States v. Beuckelaere*, 91 F.3d 781 (6th Cir. 1996), the majority held that Congress had the authority under the Commerce Clause to make the possession of a machine gun a federal crime under 18 U.S.C. § 922(o). Judge Suhrheinrich dissented in light of *Lopez*. (91 F.3d at 787-788.)

In *United States v. Chesney*, 86 F.3d 564 (6th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 2470 (1997), the Court of Appeals held that Congress had the authority under the Commerce Clause to make the possession of a gun by a convicted felon a federal crime under 18 U.S.C. § 922(g)(1). Judge Batchelder concurred on the ground that the court was bound by a prior decision of the court which had upheld the constitutionality of § 922(g)(1) against an attack under *Lopez*, even though he believed the court was wrong. (86 F.3d at 574-582.)

6. The Seventh Circuit.

In *United States v. Wilson*, 73 F.3d 675 (7th Cir. 1995), *cert. denied*, - U.S. -, 117 S.Ct. 47 (1996), the majority held that Congress had the authority under the Commerce Clause to enact the Freedom of Access to Clinic Entrances Act, 18

U.S.C. § 248. Judge Coffey dissented in light of *Lopez*. (73 F.3d at 689.)

C. Courts Of Appeals And District Courts Cannot Agree On The Meaning Of *Lopez*

Ten cases in seven circuits have resulted in a Court of Appeals reversing a district court's application of *Lopez*.

1. The Third Circuit

In *United States v. Parker*, 108 F.3d 28 (3d Cir.), *cert. denied*, - U.S. -, 118 S.Ct. 111 (1997), the Court of Appeals reversed the district court, which had held that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act of 1992, 18 U.S.C. § 228.

2. The Fourth Circuit

In *Brzonkala v. Virginia Polytechnic Institute and State University, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Violence Against Women Act of 1994, 42 U.S.C. § 13981.

In *United States v. Wilson, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that the Corps of Engineers had not exceeded its authority under the Commerce Clause in regulating isolated wetlands.

In *Hoffman v. Hunt*, 126 F.3d 575 (4th Cir. 1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers

under the Commerce Clause in enacting the Freedom of Access to Clinic Entrances Act of 1994, 18 U.S.C. § 248.

3. The Fifth Circuit

In *United States v. Bailey*, 115 F.3d 1222 (5th Cir. 1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act, 18 U.S.C. § 228.

4. The Seventh Circuit

In *United States v. Wilson, supra*, the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Freedom of Access to Clinic Entrances Act, 18 U.S.C. § 248.

5. The Eighth Circuit

In *United States v. Wright*, 128 F.3d 1274 (8th Cir. 1987), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting a portion of the Violence Against Women Act of 1994, 18 U.S.C. § 2262(a)(1).

6. The Ninth Circuit

In *United States v. Woodruff*, 122 F.3d 1185 (1997), *cert. denied*, - U.S. -, 118 S.Ct. 866 (1998), the Court of Appeals reversed the district court, which had granted a motion for acquittal in light of *Lopez* after a jury had convicted the defendant for a violation of the Hobbs Act, 18 U.S.C. § 1951(a).

In *United States v. Mussari*, 95 F.3d 787 (9th Cir. 1996), *cert. denied*, - U.S. -, 117 S.Ct. 1567 (1997), the Court of Appeals reversed the district court, which had held in light of *Lopez* that Congress had exceeded its powers under the Commerce Clause in enacting the Child Support Recovery Act of 1992, 18 U.S.C. § 228.

7. The Eleventh Circuit

In *United States v. Olin Corp.*, *supra*, the Court of Appeals reversed the district court, which had dismissed a complaint brought by the government under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. §§ 9606(a) and 9607(a)(1)(A) and (2)(A), with respect to isolated contamination in light of *Lopez*.

CONCLUSION

Everyone needs guidance from this Court as to the reach of the Endangered Species Act in light of *Lopez*. Neither landowners nor local governments know when their activities will go too far and expose them to prosecution under the Endangered Species Act. Everyone - the lower federal courts, landowners, land regulators, and, not least, the federal governmental employees charged with applying the Endangered Species Act and enforcing its criminal penalties - needs and deserves this Court's guidance.

Is this Court's analysis in *Lopez* meaningful in terms of Commerce Clause jurisprudence or is it an "aberration,"

limited to guns near schools and the torching of single family homes? *United States v. Wilson, supra*, 133 F.3d at 266 (Luttig, J., concurring). Does *Lopez* have any application to environmental laws? Does Congress have the power under the Commerce Clause to regulate land use in isolated corners of the United States where the activities which form the basis for that regulation are limited to the sites involved?

More specifically, should this Court grant certiorari to determine the meaning of *Lopez* in the case of a fly found only in one state where the only basis for saying that there is a substantial effect on interstate commerce is the generalized hope that some benefits may flow from its continued existence at some unforeseeable time in the future?

To paraphrase Justice Thomas in his dissent from the denial of the petition for a writ of certiorari in *Cargill, Inc. v. United States*, - U.S. -, 116 S.Ct. 407, 409 (1995):

> "This case raises serious and important constitutional questions about the limits of federal land-use regulation in the name of the [Endangered Species Act] that provides a compelling reason to grant certiorari in this case."

Respectfully submitted,

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DATED: March 5, 1998

(2) 971451 MAR 5 - 1998
OFFICE OF THE CLERK

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

APPENDIX A – Opinion in *National Association of Home Builders v. Babbitt,* No. 95-1973 RMU (D.D.C. December 6, 1996)..... 1a

APPENDIX B – Opinion in *National Association of Home Builders v. Babbitt,* No. 96-5354 (D.C. Cir. December 5, 1997).....23a

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

National Association of Home Builders of the United States, et al., Plaintiffs,	:	
v.	:	Civil Action No. 95-1973 RMU
Bruce Babbitt, Secretary, United States Department of Interior	:	
and	:	**FILED** **Dec 6 1996**
Mollie Beattie, Director, United States Fish and Wildlife Service, Defendants	:	**Clerk, U.S. District Court** **District of Columbia**

MEMORANDUM OPINION AND ORDER
Granting Defendants' Motion For Summary Judgment

I. INTRODUCTION

This matter comes before the court upon the parties' cross-motions for summary judgment. On April 9, 1996, pursuant to Fed.R.Civ.P. 65(a)(2), the court consolidated Plaintiff, County of San Bernardino, California's Motion for a Preliminary Injunction with the trial on the merits. Plaintiffs are organizations representing land development interests and local governments in California. They have brought this action to challenge the constitutionality of one

of the provisions of the Endangered Species Act, 16 U.S.C. § 1531, *et seq.*, specifically, the "take" provision of the Act, 16 U.S.C. § 1538(a)(1)(B). As applied to this case, this provision prohibits the Plaintiffs from developing, without a permit, the last remaining habitat of the Delhi Sands Flower-loving Fly (the Fly), the species at issue in this case.

The court must address purely legal questions regarding the Endangered Species Act and its application to the Fly. Plaintiffs argue that the federal government has "limited and enumerated" powers, and that the authority to regulate wildlife and regulate the use of non-federal land is not among these powers.[1] Plaintiffs maintain that both of these areas of regulation have been reserved to the States by the Tenth Amendment of the U.S. Constitution. Specifically, Plaintiffs assert that the "take" provision of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B), is unconstitutional.[2] In support of this argument, Plaintiffs posit that the Commerce Clause of the Constitution does not provide Congress with the authority to regulate "purely local activities that affect a species found only in California."[3] As a result, Plaintiffs ask this court to enjoin Defendants from enforcing the "take" provision of the Endangered Species Act as it applies to the Fly.[4]

---

[1] Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 14.

[2] *Id.* at 26.

[3] *Id.*

[4] *Id.* at 2.

This court, after considering the parties' submissions and the relevant law, concludes that: (1) the federal government's "limited and enumerated" powers do include the power to regulate wildlife and non-federal lands which serve as the habitat for endangered wildlife; and (2) the Endangered Species Act provides for a regulatory scheme that is within the bounds of Congress' power to enact under the Commerce Clause. The court therefore grants Defendants' Motion for Summary Judgment.

II. BACKGROUND

This matter concerns a species of fly and the Endangered Species Act. The Delhi Sands Flower-loving Fly is indigenous to southwestern San Bernardino County and northwestern Riverside County, California. The parties agree that the all known colonies of the Fly exist solely within an 8 to 10 mile radius of each other in an area straddling both of these counties. The sand contained in this area in California is known as Delhi sand and is the only known habitat for the Fly. Delhi sand covers approximately forty square miles, in irregular patches, in the area between northwestern Riverside and southwestern San Bernardino Counties.

In the recent past, the Fly's habitat was used primarily for agricultural purposes. Over approximately the past ten years, however, residential and commercial development has severely depleted the Fly's habitat. The Fish and Wildlife Service (FWS) estimates that only approximately 1200 acres of suitable habitat remains for the Fly. There are also several thousand acres of potentially restorable acreage.

Plaintiff County of San Bernardino has pursued the construction of a hospital which is located on and adjacent to one of the last remaining habitats of the Fly. The hospital site was selected in 1987. After the selection process, the site was discovered to be the home to a colony of the Fly. The day before construction was to begin, September 23, 1993, the FWS designated the Fly to be an endangered species. *See* 58 Fed.Reg. 49881 (1993). The FWS found that the Fly was in "imminent danger of extinction due to extensive habitat loss and degradation that has reduced its range by 97 percent." *Id.* at 49881. The listing of the Fly as an endangered species automatically activated the protections included in the Act. Included in these protections is a prohibition against the "taking" of an endangered species. 16 U.S.C. § 1538(a)(1)(B). The definition of "taking" includes the destruction or adverse modification of an endangered species' habitat. *See* 50 C.F.R. § 17.3 (1991). Violation of the "take" provision can subject the violator to severe penalties. 16 U.S.C. § 1540. The listing of the Fly as an endangered species caused a delay in the start of construction on the hospital and eventually forced the county to build the hospital some 250 feet north of the original site to ensure that there was no "taking" of the Fly.

As part of this construction project, the county is also redesigning an intersection located near the hospital. The redesign of this intersection calls for the realignment of one of the roads which constitute the intersection. The parties agree that the realignment plan chosen by the county will cause the new roadway to encroach on a "migration corridor" set up by the FWS for the Fly. The purpose of the corridor is to enable the Fly to travel from one protected area to another nearby area where a colony of the Fly is

located. The FWS steadfastly maintains that the alignment plan chosen by the county will amount to a taking of the Fly's habitat and is therefore in violation of the "take" provision of the Act.

Plaintiffs have provided ample evidence that the listing of the Fly as an endangered species has caused them to incur a substantial economic burden. These costs include the added expense of re-drafting the plans for the construction of the hospital, setting aside habitat for the Fly and examining different alternatives to minimize the impact of the redesign of the intersection on the Fly. In addition, the listing of the Fly has affected several local governments' ability to attract new employers to the region and to expand the physical plants of at least two current industrial employers in the area. Plaintiffs, however, do not ask this court to nullify the Act or its application to the Fly based on this sustained economic burden. Plaintiffs state that they are *not* asking the court "to make any sort of value judgment" which would require a balancing of the economic burdens imposed on individuals or municipalities by the Act versus the potential value to the nation of a single species.[5] Rather, Plaintiffs argue that Congress has *no* authority to regulate the "taking" of the Fly, irrespective of whether such regulation imposes an economic burden.[6]

---

[5] *See* Plaintiffs' Opposition to Defendants' Cross-Motion For Summary Judgment at 4 (emphasis added). Plaintiffs likewise have not asked the court to examine whether the FWS's establishment of the "migration corridor" was necessary or appropriate.

[6] *Id.* at 3 (emphasis added).

III. ANALYSIS

A. Legal Standard

Summary judgment is appropriate when the "pleadings, depositions [ ] show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also National Cable Television Assoc., Inc. v. FCC*, 479 F.2d 183, 186 (D.C.Cir.1973). When more than one party moves for summary judgment, each party must carry its own burden of proof. *United States Dep't. of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 755, 109 S.Ct. 1468, 1472-73, 103 L.Ed.2d 774 (1989). On cross-motions for summary judgment, the court shall not grant summary judgment unless one of the parties is entitled to judgment as a matter of law. *Rhoads v. McFerran*, 517 F.2d 66, 67 (2d Cir.1975); *see also* 6 James W. Moore, *et al.*, Moore's Federal Practice ¶ 56.13, at 56-171 (2d ed. 1994). When the unresolved issues are preliminarily legal, however, summary judgment is particularly appropriate. *Crain v. Police Comm'rs of Metro. Police Dep't.*, 920 F.2d 1402, 1405-06 (8th Cir.1990).

B. Congress' Power to Regulate Wildlife

1. The Commerce Clause

Article 1, Section 8 of the United States Constitution provides Congress with the power to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." The Supreme Court has held that the Commerce Clause provides Congress with broad regulatory authority. *See Hughes v. Oklahoma*, 441 U.S. 322, 326 n. 2, 99 S.Ct. 1727, 1731 n. 2, 60 L.Ed.2d 250 (1979) (stating

that, " '[t]he Commerce Clause is one of the most prolific sources of national power[.]' ") (*quoting H.P. Hood & Sons, Inc. v. Du Mond,* 336 U.S. 525, 534, 69 S.Ct. 657, 663, 93 L.Ed. 865 (1949)). Moreover, "[a] court's review of congressional enactments under the Commerce Clause should be highly deferential." *Leslie Salt Co. v. United States,* 55 F.3d 1388, 1395 (9th Cir.1995) *(citing United States v. Evans,* 928 F.2d 858, 862 (9th Cir.1991)). "The power to regulate commerce is plenary and once the power exists it is for Congress, not the courts, to choose the ends for which its exercise is appropriate." *United States v. Helsley,* 615 F.2d 784, 787 (9th Cir.1979).

In addition, regulation of intrastate activity is a proper exercise of the authority granted to Congress pursuant to the Commerce Clause if there is a rational basis to conclude that the federal regulation of said activity was essential to the control of interstate commerce. *See Maryland v. Wirtz,* 392 U.S. 183, 198, 88 S.Ct. 2017, 2025, 20 L.Ed.2d 1020 (1968) (test is "whether there is a rational basis for regarding [the statute] as regulations of commerce among the States."); *see also United States v. Rambo,* 74 F.3d 948, 952 (9th Cir.1996).[7] "A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the

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[7] The Supreme Court has held that this authority includes Congress' power to regulate surface coal mining on prime farm land, *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981); the growing of wheat for home consumption, *Wickard v. Filburn,* 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942); and the taking of fish from state waters, *Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977).

regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends." *Hodel v. Indiana*, 452 U.S. at 323-24, 101 S.Ct. at 2383. "The pertinent inquiry is [ ] whether Congress could rationally conclude that the regulated activity affects interstate commerce." *Id.* at 324, 101 S.Ct. at 2383. Importantly, each provision of a statute does not have to be independently related to interstate commerce. *Id.* at 329 n. 17, 101 S.Ct. at 2386 n. 17. A court must evaluate the particular statute as a whole. *Id.*

Whether an activity is "local" or "intrastate" is not dispositive with respect to the issue of whether Congress may regulate it under the commerce clause. *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 281, 101 S.Ct. 2352, 2362-63, 69 L.Ed.2d 1 (1981). The Commerce Clause power extends to local activity which affects interstate commerce, or the exertion of the power of Congress over it, as to make regulation of the local activity "an appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *Id.; Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471, 101 S.Ct. 715, 727-28, 66 L.Ed.2d 659 (1981) (Commerce Clause limits the power of individual states to interfere with interstate commerce even if the state's actions are aimed at addressing a legitimate local concern); *see also Wickard v. Filburn*, 317 U.S. 111, 124-25, 63 S.Ct. 82, 88-89, 87 L.Ed. 122 (1942). Furthermore, a state's right to control wildlife within its border must yield to the federal government proper exercise of federal power. *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 385-86, 98 S.Ct. 1852, 1861-62, 56 L.Ed.2d 354 (1978).

The Supreme Court has recently re-examined Congress' power under the Commerce Clause and identified three broad categories of activities that may be regulated by Congress under its interstate commerce authority. *See United States v. Lopez*, 514 U.S. 549, ----, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995).[8] First, Congress may regulate the use of the channels of interstate commerce. *Id.* at ----, 115 S.Ct. at 1629. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. *Id.* Third, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce. *Id.* at ---- - ----, 115 S.Ct. at 1629-30. The *Lopez* Court, however, was clear in stating that "[w]here economic activity substantially affects interstate commerce, legislation regulating that activity" should be judicially sustained, even though the activity may be purely local. *Id.* at ----, 115 S.Ct. at 1630.

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[8] The Court in *Lopez* struck down the Gun-Free School Zones Act, 18 U.S.C. Section 922(q), because "possession of a firearm in a local school zone does [not] substantially affect interstate commerce." 514 U.S. at ----, 115 S.Ct. at 1632. The *Lopez* Court stated that in reaching its decision, the Court was declining to further expand the reach of the Commerce Clause. *Id.* at ----, 115 S.Ct. at 1634. The Court, however, left intact its pre-*Lopez* decisions concerning Congress' power under the Commerce Clause. Justice Kennedy, whom Justice O'Conner joined, stated that:

> [t]he legal system as a whole ha[s] an immense stake in the stability of our Commerce Clause jurisprudence as it has evolved to this point.

In this case, Congress has validly exercised its power to regulate "things," specifically wildlife, that affect interstate commerce. The government has also established that the local activity that the "take" provision of the Act seeks to prohibit has a substantial relation to interstate commerce.[9]]

2. Federal Regulation of Wildlife

A review of the framework of the Endangered Species Act, the legislative record supporting its enactment, and the case law construing Congress' power to regulate wildlife, establishes, in this court's view, that Congress has the constitutional power to protect wildlife, including the Fly at issue in this case. The Endangered Species Act was enacted to address Congress' concern over the rapid depletion of our Nation's, as well as the world's, natural wildlife. Congress found that "these species [ ] are of esthetic, ecological, educational, historical, recreational and scientific value to the Nation and its people." 16 U.S.C. § 1531(a)(3). The Act builds upon the work of previous legislation directed at this objective.[10] The passage of the Act in 1973 was the result of Congress being persuaded that "a more expansive

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[9] Having thus concluded, the court does not reach Defendants' argument that the "take" provision falls under the "channels of commerce" category enunciated by the Court in *Lopez*.

[10] In 1966, Congress passed the first Endangered Species Act, 80 Stat. 926, *repealed*, 87 Stat. 903. This legislation declared the preservation of endangered species to be a national policy and gave the Secretary of the Interior the power to identify the "names of the species of native fish and wildlife found to be threatened with extinction." § 1(c), 80 Stat. 926. In addition, the 1966 Act gave the

approach was needed if the newly declared national policy of preserving endangered species was to be realized." *TVA v. Hill*, 437 U.S. 153, 176, 98 S.Ct. 2279, 2293, 57 L.Ed.2d 117 (1978). At the congressional hearings held prior to the passage of the Act, Congress was informed that species were being lost at a rate of one per year, despite the earlier passage of two bills aimed at curbing the destruction and extinction of endangered species. *Id.* In addition, the "pace of the disappearance of species" was accelerating. H.R.Rep. No. 93-412, p. 4 (1973).

Officials of the Department of the Interior testified that this accelerated pace of species disappearance was due to man's continued destruction and exploitation of natural habitats:

> [M]an and his technology has [sic] continued at any [sic] ever-increasing rate to disrupt the natural ecosystem.

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[10] **(continued)** Secretary the power to purchase land for the conservation, protection and restoration of selected species of native fish and wildlife. §§ 2(a)-(c), 80 Stat. 926-27. The 1966 Act, however, was applicable only to endangered species located on federal land. § 4(c), 80 Stat. 928.

In 1969, Congress enacted the Endangered Species Conservation Act which broadened the federal government's involvement in the preservation of endangered species. 83 Stat. 275, repealed, 87 Stat. 903. This legislation prohibited the importation into the United States of any species designated "endangered" by the Secretary. § 2, 83 Stat. 275.

> This has resulted in a dramatic rise in the number and severity of the threats faced by the world's wildlife. The truth in this is apparent when one realizes that half of the recorded extinctions of mammals over the past 2000 years have occurred in the most recent 50 year period.[11]

The Report of the House Committee on Merchant Marine and Fisheries on H.R. 37 explained the value of the genetic code of all creatures to this Nation, as well as mankind, when it stated that "[t]he value of this genetic heritage is, quite literally, incalculable." H.R.Rep. No. 93-412, pp. 4-5 (1973).[12] In addition, the Supreme Court in *TVA v. Hill*, noted that "the legislative proceedings in 1973 are, in fact, replete with expressions of concern over the risk that might lie in the loss of any endangered species." 437 U.S. at 177, 98 S.Ct. at 2293 (footnote omitted). "Congress was concerned about the unknown uses that endangered species might have and about the unforeseeable places such creatures may have in the chain of life." *Id.* at 178-79, 98 S.Ct. at 2294. Congress also established that the greatest

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[11] Hearings on Endangered Species before a Subcommittee of the House Committee on Merchant Marine and Fisheries, 93d Cong., 1st Sess., 202 (1973) (statement of Assistant Secretary of the Interior).

[12] H.R. 37 was the House version of the Endangered Species Act. H.R. 37 contained all of the substantive provisions which were eventually included in the final version of the Act passed by both houses of Congress.

threat to endangered species was destruction of natural habitat. *Id.* at 179, 98 S.Ct. at 2294 (citations omitted).

It was Congress' belief that the "[p]rotection of endangered species is not a matter that can be handled in the absence of coherent national and international policies: the results of a series of unconnected and disorganized policies and programs by various states might well be confusion compounded." H.R. 37, 93d Cong., 1st Sess., at 146 (1973). Consequently, Congress enacted the Endangered Species Act. The Act is Congress' vehicle for addressing the rapid loss of the world's species. The Act provides for a comprehensive framework for the protection of endangered and threatened species.[13] It regulates endangered wildlife by first listing a particular species as threatened or endangered. It then proscribes a regime for its protection and conservation. The Secretary of Interior is responsible for determining whether to list a species. See 16 U.S.C. § 1533(a). The Secretary considers, inter alia, the "present or threatened destruction, modification, or curtailment of [a species'] habitat or range" and the "overutilization for commercial, recreational, scientific or educational purposes." 16 U.S.C. § 1533(a)(1)(A) and (B).

---

[13] "Endangered species" means any species "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). "Threatened species" means "any species which is likely to become an endangered species within a foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(2). Listed species are those that are classified as threatened or endangered.

A listed species is endowed with a set of protections. Specifically, Section 9(a)(1) of the Act makes it unlawful for both federal and nonfederal actors to:

> (A) import any such species into, or export any such species from the United States;
> (B) take any such species within the United States or the territorial seas of the United States;
> (C) take any such species on the high seas;
> (D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);
> (E) deliver, receive, carry, transport, or ship in interstate commerce, by any means whatsoever and in the course of a commercial activity, any such species;
> (F) sell or offer for sale in interstate or foreign commerce any such species[,]

16 U.S.C. § 1538(a)(1).

To "take" means "to harass, harm, pursue, hunt, shoot wound, kill, trap, capture, or collect, or to attempt to engage in any such activity." 16 U.S.C. § 1532(19). According to the FWS, "harm" means:

> an act which actually kills or injures

> wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patters, including breeding, feeding, or sheltering.

50 C.F.R. 17.3; *see also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995).

These prohibitions are not, however, absolute. Under Section 10(a)(1) of the Act, the Secretary is authorized to permit any non-federal party to undertake,

> (A) any act otherwise prohibited by section [9] of this title for scientific purposes or to enhance the propagation or survival of the affected species[.];
>
> (B) any taking otherwise prohibited by section [9] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.

16 U.S.C. § 1539(a)(1). Federal agencies are also provided with an exemption for a "take" that is incidental to otherwise lawful actions. *See* 16 U.S.C. § 1536(b)(4) and (o).

The Act contains, in Section 11, an enforcement mechanism, which contains penalty provisions. Under §

1540(e)(6), the Department of Justice may seek injunctive relief to enjoin violation of the Act. It can also seek criminal sanctions for knowing violations of the Act. *See* 16 U.S.C. § 1540(b). The Secretary may seek civil penalties for knowing violations of the Act. *See* 16 U.S.C. § 1540(a). Finally, the public may sue "any person" to enforce the provisions of the Act. *See* 16 U.S.C. § 1540(g).

Plaintiffs do not dispute the fact that this congressionally sanctioned regime, established for the protection of threatened and endangered species, is of considerable importance.[14] Instead, Plaintiffs claim that Congress has no power to further the admittedly laudable goal of saving threatened and endangered species from extinction.[15] More specifically, Plaintiffs argue that the application of the Act to "purely local activities that affect a species found only in California," *i.e.* the Fly, is unconstitutional.[16] Plaintiffs maintain that the federal government's prohibition on the "taking" of the Fly, as proscribed by 16 U.S.C. 1538(a)(1)(B), is not supported by Congress' power under the Commerce Clause and is therefore ultra vires. The court, however, disagrees. The application of 16 U.S.C. § 1538(a)(1)(B) to the Fly is a valid exercise of Congress' power under the Commerce Clause.

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[14] *See* Plaintiffs' Opposition to Defendants' Motion for Summary Judgment at 4.

[15] *Id.* at 4-5.

[16] Memorandum of Points and Authorities in Support of Plaintiffs' Motion for Summary Judgment at 26.

a. Articles of Commerce

The record before the court clearly shows that wildlife in general, and the Fly in particular, are "thing[s] in interstate commerce." *See United States v. Lopez*, 514 U.S. 549, ----, 115 S.Ct. 1624, 1629, 131 L.Ed.2d 626 (1995). Congress recognized this fact, observing that:

> The threat to animals may arise from a variety of sources; principally pollution, destruction of habitat and the pressures of trade. For the most part, United States executive and legislative attention in recent years has concentrated upon the latter factor in attempting to enforce legislation designed to reduce or eliminate the financial incentives to trading in endangered species of fish and wildlife.
>
> Honesty compels us to admit that steps taken by H.R. 37 to close the U.S. market to trade in endangered and threatened species may not be sufficient, in and of themselves, to remove pressure and thus to allow these species to recover. Passage of this legislation is, however, of importance--both because the United States is an important market, and because of the precedent that it will create.

H.R.Rep. No. 93-412, 93rd Cong., 1st Sess., at 141, 145.

Moreover, the government has established that wildlife, including insects, is part of the stream of interstate commerce. The U.S. accounts for approximately $1.2 billion per annum in declared value of imported and exported wildlife. *See* TRAFFIC USA, U.S. Annual Imports of Wildlife. Surprisingly, "[t]he global trade in illegal wildlife generates more profits than illegal arms sales, and constitutes a world black market second only in size to the drug trade." R. Anderson, "The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking," 16 Public Land L.Rev. 26, 31 (1995) (footnotes omitted).

Relating specifically to the Fly, the government has offered uncontroverted evidence that the Fly is, and would likely continue to be, an article in interstate commerce.[17] The Fly is currently on exhibit in at least three museums located outside of the state of California. In addition, the Fly has been the subject of interstate trade among insect collectors. Lastly, interested persons have traveled from outside the state of California to observe and study the Fly.

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[17] Of course, interstate commercial trading in the Fly halted once it was declared "endangered" by the Secretary. Plaintiffs seem to be arguing that since the Act halted interstate commercial activity involving the Fly, the Fly can no longer be protected by the Act because it has lost its nexus to interstate commerce. If the court were to accept this argument, it would turn the Act on its head. Plaintiffs' logic would not afford any protection to a truly rare species, i.e. one that, due to its scarcity, cannot be transported in large numbers in interstate commerce.

b. Relation to Interstate Commerce

The prohibition on the "taking" of threatened or endangered species has a substantial relation to interstate commerce.[18] The aggregate impact upon interstate commerce of trade in wildlife is substantial and as such, it may be regulated by Congress.[19] Moreover, "[e]ven activity that is purely intrastate in character may be regulated by Congress, where the activity, combined with like conduct by others similarly situated, affects commerce among the States[.]" *Fry v. United States*, 421 U.S. 542, 547, 95 S.Ct. 1792, 1795, 44 L.Ed.2d 363 (1975). The "taking" of individual species located entirely within one state, would clearly, in the aggregate, have a significant effect upon interstate commerce.[20] Furthermore, the activity that Congress is regulating need not itself be commercial. "[E]ven if [the] activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be

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[18] Congress was well aware of this fact as the legislative history discussion reflects. *See* Section III, B, 2, supra.

[19] Congress is not required, as Plaintiffs intimate, "to make formal findings as to the substantial burdens that an activity has on interstate commerce." *Lopez*, 514 U.S. at ----, 115 S.Ct. at 1631.

[20] "Where the class of activities is regulated and that class is within the reach of the federal power, the courts have no power 'to excise as trivial individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154, 91 S.Ct. 1357, 1361, 28 L.Ed.2d 686 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193, 88 S.Ct. 2017, 2022, 20 L.Ed.2d 1020 (1968)).

reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is [ ] defined as 'direct' or 'indirect.' " *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942).

In Palila v. Hawaii Dep't. of Land and Natural Resources, 471 F.Supp. 985 (D. Hawaii 1979), *aff'd*, 639 F.2d 495 (9th Cir.1981), the court addressed the issue of whether the "take" provision of the Endangered Species Act can be applied to a species indigenous to a single state. *Palila* involved the taking of a species, a small bird, found only on the island of Hawaii within the state of Hawaii. *Id.* at 988. The natural habitat of the palila was being destroyed by the grazing patterns of feral sheep and goats located within the same geographic area. *Id.* at 989-90. The feral sheep and goat population was maintained by the Hawaii Department of Land and Natural Resources for the purpose of sport hunting. *Id.* at 989. The court concluded that even a species located entirely within the confines of a single state can have an effect on interstate commerce and therefore the application of the Act to such a species was a valid exercise of Congress' power under the Commerce Clause. *Id.* at 995. The court noted that a "national program to protect and improve habitats of endangered species preserves the possibilities of interstate commerce in these species and of the interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species" and, therefore, certainly falls within the power of Congress to regulate commerce. *Palila v. Hawaii Dep't. of Land and Natural Resources*, 471 F.Supp. 985, 995 (D.Hawaii 1979), aff'd, 639 F.2d 495 (9th Cir.1981); *see also Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304

(1977) (Congress has the power to regulate the taking of fish from state waters pursuant to the Commerce Clause); *United States v. Kepler*, 531 F.2d 796 (6th Cir. 1976) (Endangered Species Act "permissibly regulates" wildlife involved in interstate commerce); *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264, 281, 101 S.Ct. 2352, 2362-63, 69 L.Ed.2d 1 (1981) (destruction of fish and wildlife and their habitat affects interstate commerce).

The Fly is in an identical situation to the palila. The Fly is located exclusively within the confines of the state of California. Just like the palila, the Fly's natural habitat is now subject to destruction. Plaintiffs do not dispute that such destruction will lead to the extinction of the Fly.[21] The Fly's relationship to interstate commerce is, however, stronger than that of the palila because it has been an article of commerce.[22]

Finally, the Lopez Court's re-examination of the contours of Congress' power to legislate pursuant to the Commerce Clause does not affect this court's evaluation of the issues in this case. The Lopez Court specifically stated

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[21] Plaintiffs argue that the FWS's Draft Recovery Plan for the Fly states that the Fly will become extinct irrespective of what measures are taken to conserve its habitat. A careful reading of the Plan, however, demonstrates that the FWS deemed the extinction of the Fly in the foreseeable future a "likely event" unless there was an immediate plan for the management of its habitat put in place. Draft Recovery Plan at 1 (emphasis added).

[22] The Palila court did not so conclude.

that the criminal statute at issue in that case was not "an essential part of a larger regulation of economic activity, in which the regulatory scheme would be undercut unless the intrastate activity were regulated." 514 U.S. at ----, 115 S.Ct. at 1631. Presently, the take provision, is an "essential part of a larger" regulatory scheme. *Id.* It allows the federal government to regulate intrastate activities that, in the aggregate, have an interstate impact and which affect endangered species indigenous to small localized areas completely within one state's borders.

This court therefore concludes that the application of 16 U.S.C. § 1538(a)(1)(B) to the Fly is a valid exercise of Congress' power pursuant to the Commerce Clause.

For the foregoing reasons, it is this 6th day of December 1996.

ORDERED that Defendents' Motion For Summary Judgment be and is hereby **granted;**

And it is

FURTHER ORDERED that this case be dismissed from the court's docket **with prejudice**.

SO ORDERED.

/s/ Ricardo M. Urbina
Ricardo M. Urbina
United States District Judge

APPENDIX B

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 3, 1997 Decided December 5, 1997

No. 96-5354

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
APPELLANTS

v.

BRUCE BABITT, SECRETARY,
UNITED STATES DEPARTMENT OF INTERIOR AND
MOLLIE BEATTIE, DIRECTOR,
UNITED STATES FISH AND WILDLIFE SERVICE,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 95cv01973)

Thomas C. Jackson argued the cause for appellants, with whom *Patrick J. Hurd, Arthur S. Garrett III, Martha E. Marrapese, Glen F. Koontz* and *Alec I. Ugol* were on the briefs. *Alan K. Marks* entered an appearance.

David C. Shilton, Attorney, United States Department of Justice, argued the cause for appellees, with whom *Lois J. Schiffer*, Assistant Attorney General, and *J. Carol Williams*, Attorney, were on the brief. *John A. Bryson*, Attorney, entered an appearance.

William R. Irvin, *Kathleen Rogers*, *Josh Eagle* and *Micheal J. Bean* were on the brief for *amici curiae* Center for Marine Conservation, et al.

Robin L. Rivett and *Anne M. Hawkins* were on the brief for *amicus curiae* Pacific Legal Foundation.

Daniel J. Popeo and *Paul D. Kamenar* were on the brief for *amicus curiae* Washington Legal Foundation.

Paul M. Terrill, III was on the brief for *amicus curiae* American Land Foundation.

Before: WALD, SENTELLE and HENDERSON, *Circuit Judges*.

Opinion filed by *Circuit Judge* WALD.

Concurring opinion filed by *Circuit Judge* HENDERSON.

Dissenting opinion filed by *Circuit Judge* SENTELLE.

WALD, *Circuit Judge*:

Bills of cost must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

The National Association of Home Builders of the United States, the Building Industry Legal Defense Fund, the County of San Bernardino, and the City of Colton, California brought this action in the United States District Court for the District of Columbia to challenge an application of section 9(a)(1) of the Endangered Species Act ("ESA"), 16 U.S.C. § 1538(a)(1), which makes it unlawful for any person to "take"--*i.e.*, "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct," 16 U.S.C. § 1532(19)--any endangered species. The plaintiffs sought a declaration that the application of section 9 of the ESA to the Delhi Sands Flower-Loving Fly ("the Fly"), which is located only in California, exceeds Congress' Commerce Clause power and an injunction against application of the section to the plaintiff's construction activities in areas containing Fly habitat.

This dispute arose when the Fish and Wildlife Service ("FWS") placed the Fly, an insect that is native to the San Bernardino area of California, on the endangered species list. The listing of the Fly, the habitat of which is located entirely within an eight mile radius in southwestern San Bernardino County and northwestern Riverside County, California, forced San Bernardino County to alter plans to construct a new hospital on a recently purchased site that the FWS had determined contained Fly habitat. The FWS and San Bernardino County agreed on a plan that would allow the County to build the hospital and a power plant in the area designated as Fly habitat in return for modification of the construction plans and purchase and set aside of nearby land as Fly habitat. In November 1995, FWS issued a permit to allow construction of the power plant. During the same month, however, the County notified the FWS that

it planned to redesign a nearby intersection to improve emergency vehicle access to the hospital. The FWS informed the County that expansion of the intersection as planned would likely lead to a "taking" of the Fly in violation of ESA section 9(a). After brief unsuccessful negotiations between the County and FWS, the County filed suit in district court challenging the application of section 9(a)(1) to the Fly.

The district court held that application of section 9(a)(1) of the Endangered Species Act to the Fly is a valid exercise of Congress' power pursuant to the Commerce Clause. Accordingly, the court entered summary judgment on behalf of the government. *See National Association of Home Builders v. Babbit*, 949 F.Supp. 1, 2 (D.D.C.1996). Because we also find that the application of section 9(a)(1) of the Endangered Species Act to the Fly does not exceed Congress' Commerce Clause power, we affirm the district court's decision to grant the government's motion for summary judgment.[1]

I. FACTUAL AND PROCEDURAL BACKGROUND

The Delhi Sands Flower-Loving Fly, which lives only in the "Delhi series" soils found in southwestern San Bernardino County and northwestern Riverside County, California, is the only remaining subspecies of its species.

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[1] Summary judgment is appropriate when all of the submissions "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56.

The other subspecies, the El Segundo Flower-Loving Fly, is believed to be extinct due to destruction of its habitat through urban development. *See* Brief of Amici Curiae Center for Marine Conservation, Defenders of Wildlife, Environmental Defense Fund, National Audubon Society, and World Wildlife Fund ("Brief of Amici Curiae for Appellees") at 4. The Fly is also one of only a few North American species in the "mydas flies" family and one of only a few species in that family that visit flowers in search of nectar, thereby pollinating native plant species. *See Id.* at 1.

Over 97 percent of the historic habitat of the Fly has been eliminated, and, prior to its listing as endangered, its remaining habitat was threatened by urban development, unauthorized trash dumping, and off-road vehicle use. *See* Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Delhi Sands Flower-Loving Fly, 58 Fed.Reg. 49,881, 49,885 (1993) (codified at 50 C.F.R. pt. 17). There are currently 11 known populations of the Fly, all of which occur within an eight mile radius of one another. *See* Declaration of Christopher D. Nagano (Apr. 30, 1996) at ¶ 14 ("Nagano Declaration"). The size of the entire population of Flies was recently estimated in the low hundreds. *See* U.S. Fish and Wildlife Service, Technical/Agency Draft Recovery Plan for the Delhi Sands Flower-Loving Fly 12 (1996).

In 1990, after receiving two petitions asking that the Fly be placed on the endangered species list, the FWS began an investigation into whether listing of the Fly as endangered was warranted. Soon thereafter, the FWS found that substantial information had been presented to indicate that the Fly was an endangered species. Two years later, the

FWS published its final determination that the Fly is "in imminent danger of extinction due to extensive habitat loss and degradation that has reduced its range by 97 percent." 58 Fed.Reg. at 49,881. The listing of the Fly as endangered triggered the automatic statutory prohibitions of section 9(a)(1) of the ESA, 16 U.S.C. § 1538(a)(1). As a result, commercial trade in the species could no longer occur lawfully and no person could "take" individuals of the species without a permit or an exemption.

For several years prior to the listing of the Fly as endangered, the County of San Bernardino had been planning to build a $470 million earthquake-proof "state of the art" hospital to serve as the central emergency medical center for the San Bernardino County area in the event of an earthquake and to serve as a primary burn care center and teaching facility. In July 1992, two years after the FWS had published its notice that sufficient information had been presented to justify listing the Fly as endangered but before the Fly was actually so listed, the Board of the new San Bernardino County hospital acquired the final site parcels for the hospital. The 76-acre site that the board acquired contained habitat of the Fly.

In November 1992, the FWS notified the County that the Fly was likely to be listed as endangered, and in May 1993--after the Fly was listed--the FWS advised the County that the hospital site was occupied by the Fly and that construction of the facility as then proposed would likely "take" members of the species in violation of the ESA. The County decided to modify the layout and design of the hospital to eliminate direct and indirect impacts to the Fly

and to eliminate the need for a section 10 "incidental take permit."[2] One of the modifications to the original design for the hospital included in the plan was to move the hospital 250 feet north to "avoid[ ] direct impact to the entire area identified as occupied or suitable Delhi Fly habitat." Habitat Preservation, Habitat Enchangement [sic] and Impact Avoidance Plan for the Delhi Sands Flower-Loving Fly at the San Bernardino County Hospital Replacement Site 8 (Dec. 1, 1993). This resulted in an 8.35 acre Delhi Fly habitat preserve. *Id.* The plan also created a 100-foot wide corridor to link two Fly habitat areas and permit interbreeding between Fly colonies.

In October 1994, the County approached FWS with a proposal to construct a substation to power the hospital on "the best remaining habitat" for the Fly. *See* Declaration of Jeffery M. Newman 8 (Apr. 29, 1996) ("Newman Declaration"). The County submitted an application for incidental "take" of the Fly, which would permit it to build on about 4 acres of Fly habitat. To offset this reduction in

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[2] Under section 10 of the ESA, the Secretary of the FWS may permit a taking of an endangered species otherwise prohibited by section 9(a)(1) if the taking is incidental to carrying out an otherwise lawful activity. No permit may be issued until after the applicant submits a conservation plan, the Secretary offers opportunity for public comment on the plan, and the Secretary finds, among other things, that the taking will be incidental, the impacts of the taking will be minimized to the extent practicable, adequate funding for the plan is available, and the taking will not appreciably reduce the likelihood of the survival and recovery of the species. *See* 16 U.S.C. § 1539(a).

Fly habitat, the County proposed to acquire and manage a nearby 7.5 acre site as Fly habitat. In November 1995, the FWS issued the section 10 permit for the substation and construction began shortly thereafter. *See Id.* at 9.

In November 1995, the County informed FWS of its plans to redesign an intersection near the hospital that the County argues is critical to emergency vehicle access to the new hospital. The FWS determined that the plan, which called for a reduction of the 100 foot wide corridor to an 18 foot wide corridor, a reduction of 70 to 80 percent, would "greatly reduce, if not effectively eliminate, the entire corridor area set aside as a critical part of the County's efforts to avoid a take" of the Fly. Newman Declaration at 7. The FWS advised the County that the redesign of the intersection would probably cause a "take" of the Fly in violation of section 9 of the ESA.

On October 20, 1995, the National Association of Home Builders of the United States, the Building Industry Legal Defense Fund, the County of San Bernardino, and the City of Colton, California filed a complaint seeking a declaration that the taking prohibition of section 9 of the ESA was unconstitutional as applied to "takes" of the Fly and asking for an injunction barring application of the provision. An amended complaint later added the California Building Industry Association and the City of Fontana as plaintiffs. On December 6, 1996, the district court granted the government's motion for summary judgment. *See National Association of Home Builders*, 949 F.Supp. 1. This appeal ensued.

II. DISCUSSION

Appellants challenge the application of section 9(a)(1) of the ESA, which makes it unlawful for any person to "take any [endangered or threatened] species within the United States or the territorial sea of the United States," 16 U.S.C. § 1538(a)(1), to the Delhi Sands Flower-Loving Fly. *See also Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (upholding agency's interpretation of the term "take" to include significant habitat degradation). Appellants argue that the federal government does not have the authority to regulate the use of non-federal lands in order to protect the Fly, which is found only within a single state. Indeed, they claim that "the Constitution of the United States does not grant the federal government the authority to regulate wildlife, nor does it authorize federal regulation of nonfederal lands." Brief for Appellants at 17.

The district court held that the application of section 9(a)(1) of the ESA to the Fly is constitutional. It concluded that the federal government's "limited and enumerated" powers include the power to regulate wildlife and nonfederal lands that serve as the habitat for endangered species. The court also concluded that the ESA provides for a regulatory scheme that is within the bounds of Congress' power under the Commerce Clause. The district court thus granted the government's motion for summary judgment. We affirm the district court's decision.

Appellants' Commerce Clause challenge to the application of section 9(a)(1) of the ESA to the Fly rests on the Supreme Court's decision in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). In

Lopez, the Court held that the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), which made possession of a gun within a school zone a federal offense, exceeded Congress' Commerce Clause authority. Drawing on its earlier Commerce Clause jurisprudence, *see especially Perez v. United States*, 402 U.S. 146, 150, 91 S.Ct. 1357, 1359-60, 28 L.Ed.2d 686 (1971), the *Lopez* Court explained that Congress could regulate three broad categories of activity: (1) "the use of the channels of interstate commerce," (2) "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities," and (3) "those activities having a substantial relation to interstate commerce ... i.e., those activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S.Ct. at 1629-30 (citations omitted). Possession of a gun within 1000 feet of a school, the Court explained, clearly did not fit the first two categories. In addition, it could not be regulated under the third category as an activity that "substantially affects" interstate commerce because it was not commercial in nature and was not an essential part of a larger regulation of economic activity. Moreover, the Court explained, Congress had made no findings about the effect of gun possession in school zones on interstate commerce. Thus, concluding that Congress had no rational basis for finding that gun possession within school zones had a substantial effect on interstate commerce, the Court declared the statute unconstitutional. *See id.* at 567- 68, 115 S.Ct. at 1633-34.

It is clear that, in this instance, section 9(a)(1) of the ESA is not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce. As a result, only the first and the third categories of activity

discussed in *Lopez* will be examined. In evaluating whether ESA section 9(a)(1) is a regulation of the use of the channels of interstate commerce or of activity that substantially affects interstate commerce, we may look not only to the effect of the extinction of the individual endangered species at issue in this case, but also to the aggregate effect of the extinction of all similarly situated endangered species. As the *Lopez* Court explained, " 'where a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under the statute is of no consequence.' " *Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629 (*quoting Maryland v. Wirtz*, 392 U.S. 183, 196 n. 27, 88 S.Ct. 2017, 2024 n. 27, 20 L.Ed.2d 1020 (1968), *overruled on other grounds, National League of Cities v. Usery, 426* U.S. 833, 96 S.Ct. 2465, 49 L.Ed.2d 245 (1976), overruled *by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985) (first emphasis added)). If a statute regulates "a class of activities ... within reach of the federal power," *Perez*, 402 U.S. at 154, 91 S.Ct. at 1361, the courts have "no power 'to excise, as trivial, individual instances' of the class," *Id.* Because section 9(a)(1) of the ESA regulates a class of activities-takings of endangered species--that is within Congress' Commerce Clause power under both the first and third *Lopez* categories, application of section 9(a)(1) to the Fly is constitutional.[3]

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[3] Judge Henderson's concurring opinion expresses the view that the first *Lopez* category does not apply; as to the third *Lopez* category, however, I find our reasoning to be substantially similar. We agree that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise

A. Channels of Interstate Commerce

Application of section 9(a)(1) of the ESA to the Fly can be viewed as a proper exercise of Congress' Commerce Clause power over the first category of activity that the *Lopez* Court identified: the use of the "channels of interstate commerce." *Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629. Although this category is commonly used to uphold regulations of interstate transport of persons or goods, it need not be so limited. Indeed, the power of Congress to regulate the channels of interstate commerce provides a justification for section 9(a)(1) of the ESA for two reasons. First, the prohibition against takings of an endangered species is necessary to enable the government to control the transport of the endangered species in interstate commerce. Second, the prohibition on takings of endangered animals falls under Congress' authority " 'to keep the channels of interstate commerce free from immoral and injurious uses.' " *Id. (quoting Heart of Atlanta Motel Inc. v. United*

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[3] **(continued)** on interstate commerce," Concurring opinion ("Conc. op.") at 1058 (footnote omitted); *cf. infra* subsection II.B.1, and that "at the time it passed ESA the Congress contemplated protecting endangered species through regulation of land and its development, which is precisely what the Department has attempted to do here. Such regulation, apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce," Conc. op. At 1059; *cf. infra* subsection II.B.2.

States, 379 U.S. 241, 256, 85 S.Ct. 348, 356-57, 13 L.Ed.2d 258 (1964)).[4]

The ESA's prohibition on takings of endangered species can be justified as a necessary aid to the prohibitions in the ESA on transporting and selling endangered species in interstate commerce. In this sense, the prohibition against takings of endangered species is analogous to the prohibition against transfer and possession of machine guns (including purely intrastate possession) of 18 U.S.C. § 922(o), which has been upheld by the Fifth, Sixth, Ninth, and Eleventh Circuits as a regulation of the channels of interstate commerce. In *United States v. Rambo*, 74 F.3d 948, 951 (9th Cir.), *cert. denied*, --- U.S. ----, 117 S.Ct. 72, 136 L.Ed.2d 32 (1996), for instance, the Ninth Circuit upheld section 922(o) against a Lopez-inspired Commerce Clause challenge. The court held that the statute was a " 'regulation of the use of the channels of interstate commerce' " because "[b]y regulating the market in machineguns, including regulating intrastate machinegun

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[4] **(continued)** Judge Sentelle unsuccessfully attempts to draw a parallel between the statute at issue in *Lopez*, which the Supreme Court determined was not a regulation of the use of the channels of interstate commerce, and the statute at issue in this case. In fact, the two statutes are different in material respects. First, § 922(q)'s prohibition against possession of a firearm in a school zone clearly was not necessary to enable the government to control the transportation of firearms in interstate commerce. Yet, as noted above and discussed in greater depth below, the ESA's prohibition against taking endangered species is necessary to enable the government to control the transport of endangered species in interstate commerce. Thus, in this respect, ESA section

possession, Congress has effectively regulated the interstate trafficking in machineguns." *Id.* at 952 (quoting *Lopez*, 514 U.S. at 559, 115 S.Ct. at 1629-30).[5] Thus, section 922(o) is properly classified as a first category regulation because "

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[4] **(continued)** 9(a)(1) is much more similar to the prohibition against transfer and possession of machine guns of 18 U.S.C. § 922(o), which has been repeatedly found constitutional, than it is to § 922(q). *See infra* text accompanying notes 5 & 6. Second, § 922(q)'s prohibition against possession of a firearm in a school zone clearly did not fall under Congress' authority " 'to keep the channels of interstate commerce free from immoral and injurious uses,' " *Heart of Atlanta*, 379 U.S. at 256, 85 S.Ct. at 357, because it regulated possession of firearms within only a very limited area. However, as is again discussed in greater depth below, the ESA's prohibition on taking endangered animals clearly does fall under Congress' authority to keep the channels of interstate commerce free from immoral and injurious uses in cases where the pressures of interstate commerce place the existence of species in peril.

[5] The other circuits that held that section 922(o) is a proper exercise of Congress' power to regulate the "channels of interstate commerce" employed similar reasoning. *See United States v. Wright*, 117 F.3d 1265, 1270 (11th Cir.1997) (upholding section 922(o) on the ground that Congress had a rational basis to determine that a total ban on possession of machineguns would have a substantial effect on interstate commerce because "the connection between the elimination of the lawful demand for machineguns and the manufacture, importation, and interstate transfer of these products is obvious and direct"); *United States v. Beuckelaere*, 91 F.3d 781, 784 (6th Cir.1996) (upholding 19 U.S.C. § 922(o) as a first category

'federal regulation of intrastate incidents of transfer and possession is essential to effective control of the interstate incidents of such traffic.' " *Id. (quoting United States v. Kirk*, 70 F.3d 791, 797 (5th Cir.1995)), aff'd, 105 F.3d 997 (5th Cir.1997) (en banc), *cert. denied*, --- U.S. ----, 118 S.Ct. 47, --- L.Ed.2d ---- (1997). In other words, it is necessary to regulate possession of machineguns in order to effectively regulate the interstate traffic in machineguns because it is impossible to sell machineguns in interstate

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[5] **(continued)** regulation because "§ 922(o) regulates the 'extensive, intricate, and definitely national market for machineguns' by prohibiting the transfer and possession of machineguns acquired after May 19, 1986") (citations omitted); *United States v. Kirk*, 70 F.3d 791, 796-97 (5th Cir.1995), *aff'd*, 105 F.3d 997 (5th Cir.1997) (en banc), *cert. denied*, --- U.S. ----, 118 S.Ct. 47, --- L.Ed.2d ---- (1997) (holding that "section 922(o) is a regulation which attempts 'to prohibit the interstate transportation of a commodity through the channels of commerce," because the ban on possession of machineguns controls "the interstate market for machineguns by creating criminal liability for those who would constitute the demand side of the market") (citations omitted). The en banc court in United States v. Kirk, 105 F.3d 997, was equally divided, with eight judges voting to affirm and eight judges voting to reverse the district court judgment. In addition, there were two separate opinions affirming the judgment of the district court. Neither of the affirming opinions directly addresses the issue of whether section 922(o) is a regulation of the "channels of interstate commerce." Therefore, I cite the Fifth Circuit's panel decision not for its precedential value but because I find its reasoning instructive.

commerce without first possessing them. Similarly, the prohibition on "taking" endangered species is properly classified as a first category regulation because one of the most effective ways to prevent traffic in endangered species is to secure the habitat of the species from predatory invasion and destruction. Therefore, like section 922(o), section 9(a)(1) of the ESA can be properly upheld as a regulation of the use of the channels of interstate commerce.[6]

The prohibition on takings of endangered animals also falls under Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes. This authority was perhaps best described by the Supreme Court in *Heart of Atlanta*, 379 U.S. 241, 85 S.Ct. 348, which the *Lopez* Court cited and quoted in its reference to Congress' power to regulate the use of the "channels of interstate commerce." In *Heart of Atlanta*, the Supreme Court upheld a prohibition on racial discrimination in places of public accommodation serving interstate travelers against a Commerce Clause challenge. The Court explained that " 'the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained,

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[6] The District Court of Massachusetts used similar reasoning in upholding against a Commerce Clause challenge the conviction of a defendant who purchased a guide and hunted Alaskan wildlife with a false residential hunting license in violation of the Lacey Act. *See United States v. Romano*, 929 F.Supp. 502 (D.Mass.1996). The court explained that "Congress may employ reasonable means to rid the channels of interstate commerce of illegally taken wildlife." *See Id.* at 509 (citations omitted).

and is no longer open to question.' " *Id.* at 256, 85 S.Ct. at 357 (citation omitted) (quoted in *Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629). It does not matter if the activities that are regulated are of a "purely local character," the Court elaborated, " '[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze.' " *Id.* at 258, 85 S.Ct. at 358 (citation omitted). Thus, the power of Congress over interstate commerce "also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce." *Id.* This same principle was elaborated in the seminal case of *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), which was the only other case cited by the Lopez Court in its description of the first category of activity that Congress can regulate under its commerce power. In *Darby*, the Court upheld federal wage and hour regulations against a Commerce Clause challenge, noting that such regulations were necessary to prevent states with higher regulatory standards from being disadvantaged vis-a-vis states with lower regulatory standards. In upholding the regulation, the Court explained that "Congress, following its own conception of public policy concerning the restrictions which may appropriately be imposed on interstate commerce," is free to exclude from commerce goods that will have injurious effects in the state in which they are produced or to which they are destined. *Id.* at 114, 61 S.Ct. at 457. This is true even though the activity prohibited by the regulation at issue in *Darby*--failure to meet minimum wage and maximum hour requirements--might have had little or no direct effect outside the state in which the goods were produced.

This same reasoning that the Supreme Court applied in *Darby* and *Heart of Atlanta* is applicable to the case at hand. In those cases as well as here, Congress used its authority to rid the channels of interstate commerce of injurious uses to regulate the conditions under which goods are produced for interstate commerce. In *Darby*, Congress used this authority to prevent labor exploitation of employees producing lumber for interstate commerce. In *Heart of Atlanta*, Congress used this authority to prevent racial discrimination by a hotel serving an interstate clientele. Similarly, in this case, Congress used this authority to prevent the eradication of an endangered species by a hospital that is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state. Thus, like regulations preventing racial discrimination or labor exploitation, regulations preventing the taking of endangered species prohibit interstate actors from using the channels of interstate commerce to "promot[e] or spread[ ] evil, whether of a physical, moral or economic nature." *North American Co. v. S.E.C.*, 327 U.S. 686, 705, 66 S.Ct. 785, 796, 90 L.Ed. 945 (1946). Congress is therefore empowered by its authority to regulate the channels of interstate commerce to prevent the taking of endangered species in cases like this where the pressures of interstate commerce place the existence of species in peril.

In his dissent, Judge Sentelle claims that this analysis of *Darby* and *Heart of Atlanta* is "far off the mark." Dissenting opinion ("Diss. op.") at 1063. It is his analysis, however, that is inconsistent with the reasoning and results in these cases. In Judge Sentelle's view, the only regulations that would qualify as a proper regulation of the

channels of interstate commerce are direct regulations of persons or things that move across state lines. This view is simply not consistent with the Court's decisions in *Darby* and *Heart of Atlanta*, which I again note are the only two cases the Lopez Court cited to illustrate its first category of authorized regulation. Neither *Darby* nor *Heart of Atlanta* involved a direct regulation of persons or things that moved across state lines. The statute challenged in *Darby* set wage and hour requirements for lumber factory employees, while the statute in *Heart of Atlanta* prohibited racial discrimination against hotel customers. Judge Sentelle's argument thus proves too much: If only direct regulation of goods that travel in interstate commerce can be upheld as valid under the channels of interstate commerce prong of *Lopez,* both of these statutes must fail as well, a result patently inconsistent with the Court's express affirmance of them in *Lopez.* Therefore, contrary to Judge Sentelle's assertion, see Diss. op. at 1063- 1064, the argument that access to the channels of interstate commerce may be regulated in order to prevent injurious local practices that in turn have a substantial harmful effect on interstate commerce either by discouraging such commerce or by inciting a race to the bottom is neither novel nor unduly extensive; indeed, it is the core reasoning of *Darby* and *Heart of Atlanta.*

B. *Substantially Affects Interstate Commerce*

The takings clause in the ESA can also be viewed as a regulation of the third category of activity that Congress may regulate under its commerce power. According to *Lopez,* the test of whether section 9(a)(1) of the ESA is within this category of activity "requires an analysis of whether the regulated activity 'substantially affects'

interstate commerce." 514 U.S. at 559, 115 S.Ct. at 1630. A class of activities can substantially affect interstate commerce regardless of whether the activity at issue--in this case the taking of endangered species--is commercial or noncommercial. As the *Lopez* Court, quoting *Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942), noted:

> "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

Lopez, 514 U.S. at 556, 115 S.Ct. at 1628 (quoting *Wickard*, 317 U.S. at 125, 63 S.Ct. at 89).[7]

This interpretation of the *Lopez* decision is consistent with this court's recent decision in *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997). In *Terry*, we upheld the Freedom of Access to Clinic Entrances Act against a Commerce

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[7] Indeed, the case at hand is in many ways directly analogous to *Wickard*. In both cases, the appellee's activity, growing wheat for personal consumption and taking endangered species, is local and is not "regarded as commerce." *Wickard*, 317 U.S. at 125, 63 S.Ct. at 89. However, in both cases, the activity exerts a substantial economic effect on interstate commerce--by affecting the quantity of wheat in one case, and by affecting the quantity of species in the other.

Clause challenge, concluding that the *Lopez* decision did not restrict Congress' Commerce Clause power to activity that is "commercial." We rejected the argument that Congress could not regulate protest in front of abortion clinics because protest is an intrastate, noncommercial activity, explaining that "Congress has authority to regulate 'activities that substantially affect interstate commerce.' " *Id.* at 1417 (quoting *Lopez,* 514 U.S. at 559, 115 S.Ct. at 1629-30 (emphasis added)). We further explained that in order to be subject to Congress' Commerce Clause power, "[t]he regulated activity--in this case, interfering with abortion clinics--need not be commercial, so long as its effect on interstate commerce is substantial." *Id.*[8]

Other circuits have also held that a statute need not regulate economic activity directly in order to fall under Act against a challenge alleging that the Act constitutes an Congress' Commerce Clause power. For instance, the Fifth

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[8] Interestingly, Judge Sentelle, who concurred in the Court's opinion in *Terry v. Reno*, 101 F.3d 1412, fails to cite the case in his dissenting opinion. Indeed, he appears to assert propositions that are directly at odds with the Court's reasoning in that case. For instance, he claims that ESA section 9(a)(1)(B) is not a permissible exercise of Congress' commerce power because "like the statute challenged in *Lopez*, [it] does not regulate commerce." Diss. op. at 1062. Yet in *Terry v. Reno*, this Court clearly indicated that Congress' Commerce Clause power is not limited to regulating commercial activity. Rather, it is limited to regulating activity that has a substantial effect on interstate commerce. See *Terry*, 101 F.3d at 1417. Were we to apply Judge Sentelle's reasoning in his dissenting opinion here to *Terry*, it would dictate a result contrary to the Court's holding in that case.

Circuit upheld the Freedom of Access to Clinic Entrances unconstitutional exercise of Congress' Commerce Clause power because it proscribes intrastate, noncommercial activity. *United States v. Bird*, 124 F.3d 667, 669-70 (5th Cir.1997). Acknowledging that the statute regulates intrastate, noncommercial protest activity, the court held that the statute was a proper exercise of Congress' Commerce Clause power because it had a substantial effect on interstate commerce. The court explained, "[a]fter *Wickard*--and its reaffirmance in *Lopez*--there can be no question that Congress is able to regulate noncommercial, intrastate activity that substantially affects interstate commerce...." *Id.* at 676. Similarly, the Eleventh Circuit recently upheld the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against a Commerce Clause challenge by the operator of a chemical manufacturing facility that was required to pay for the cleanup of entirely localized environmental contamination caused by the facility. *See U.S.A. v. Olin Corp.*, 107 F.3d 1506, 1510 (11th Cir.1997). The court explained that a statute need not "regulate economic activity directly to satisfy the Commerce Clause" because "*Lopez* reiterates that a statute will pass constitutional muster if it regulates an activity, whatever its nature, 'that arise[s] out of or [is] connected with a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce.' " *Id.* (quoting *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630- 31).

A recent Supreme Court decision confirms our holding in *Terry*, 101 F.3d 1412, that activity need not be commercial in character in order to be regulated by Congress under the Commerce Clause. In *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Maine*, --- U.S. ----, ----, 117 S.Ct. 1590,

1602, 137 L.Ed.2d 852 (1997), which involved a Commerce Clause challenge to an otherwise generally applicable state property tax exemption for charitable institutions that excluded organizations operated principally for the benefit of nonresidents, the Supreme Court held that the Commerce Clause applies to activity regardless of whether it was undertaken with the intention of earning a profit. Citing its earlier opinion in *Edwards v. California*, 314 U.S. 160, 62 S.Ct. 164, 86 L.Ed. 119 (1941), in which the Court had held that interstate transportation of indigent persons was "commerce" regardless of whether it was "commercial in character," *Id.* at 172 n. 1, 62 S.Ct. at 166 n. 1, the Court explained that it had "already held that the dormant Commerce Clause is applicable to activities undertaken without the intention of earning a profit." --- U.S. at ----, 117 S.Ct. at 1602. This decision confirms that the proper test of whether an activity can be regulated under the Commerce Clause is not whether the activity is itself commercial or economic but rather whether the activity has a substantial effect on interstate commerce.

In evaluating the effect of the regulated activity on interstate commerce, I begin, as we did in *Terry*, 101 F.3d 1412, with the legislative history of the Act under challenge. As we explained in *Terry*, "we consider 'even congressional committee findings' regarding the effect on interstate commerce of the regulated activity." 101 F.3d at 1415 (quoting *Lopez*, 514 U.S. at 562, 115 S.Ct. at 1631).

The Committee Reports on the ESA reveal that one of the primary reasons that Congress sought to protect endangered species from "takings" was the importance of the continuing availability of a wide variety of species to interstate commerce. As the House Report explained:

> As we homogenize the habitats in which these plants and animals evolved, and as we increase the pressure for products that they are in a position to supply (usually unwillingly) we threaten their--and our own--genetic heritage.
> The value of this genetic heritage is, quite literally, incalculable....
> ...
>
> From the most narrow possible point of view, it is in the best interests of mankind to minimize the losses of genetic variations. The reason is simple: they are potential resources. They are keys to puzzles which we cannot solve, and may provide answers to questions which we have not yet learned to ask.
> ...
> Who knows, or can say, what potential cures for cancer or other scourges, present or future, may lie locked up in the structures of plants which may yet be undiscovered, much less analyzed? More to the point, who is prepared to risk being [sic] those potential cures by eliminating those plants for all time? Sheer self interest impels us to be cautious.

H.R.REP. NO. 93-412, at 4-5 (1973). Similarly, the Senate Report on the precursor to the ESA, noted:

> ...From a pragmatic point of view, the protection of an endangered species of wildlife with some commercial value may permit the regeneration of that species to a level where controlled exploitation of that species can be resumed. In such a case businessmen may profit from the trading and marketing of that species for an indefinite number of years, where otherwise it would have been completely eliminated from commercial channels in a very brief span of time. Potentially more important, however, is the fact that with each species we eliminate, we reduce the [genetic] pool ... available for use by man in future years. Since each living species and subspecies has developed in a unique way to adapt itself to the difficulty of living in the world's environment, as a species is lost, its distinctive gene material, which may subsequently prove invaluable to mankind in improving domestic animals or increasing resistance to disease or environmental contaminant, is also irretrievably lost.

S.REP. NO. 91-526, at 3 (1969).

This legislative history distinguishes the ESA from the statute at issue in *Lopez*. In *Lopez*, the Court noted that "as part of our independent evaluation of constitutionality under the Commerce Clause we of course consider legislative

findings, and indeed even congressional committee findings regarding effect on interstate commerce." 514 U.S. at 562, 115 S.Ct. at 1631 (citations omitted). The *Lopez* Court found, however, that there were no "congressional findings [that] would enable [it] to evaluate the legislative judgment that the activity in question substantially affected interstate commerce." *Id.* at 563, 115 S.Ct. at 1632. In this case, in contrast, the committee reports on the ESA discuss the value of preserving genetic diversity and the potential for future commerce related to that diversity. *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 178-79, 98 S.Ct. 2279, 2293- 94, 57 L.Ed.2d 117 (1978) (recognizing that one of the primary concerns underlying the Endangered Species Act was concern "about the unknown uses that endangered species might have and about the unforeseeable place such creatures may have in the chain of life on this planet").[9]

These congressional findings, while highly informative, are of course not sufficient by themselves to make the

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[9] Despite the Supreme Court's directive in *Lopez* that a court reviewing the constitutionality of a statute consider congressional findings, *see Lopez*, 514 U.S. at 557, 562, 115 S.Ct. at 1631, and the extensive case law indicating that the role of a reviewing court is to determine whether there is "any rational basis" for a congressional finding that a regulated activity substantially affects interstate commerce, see, *e.g.*, *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981); *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir.1997), Judge Sentelle totally ignores the extensive legislative history of the ESA.

statute constitutional. The courts evaluating Commerce Clause challenges to federal statutes must determine that there was a rational basis for Congress' conclusion that a regulated activity substantially affects interstate commerce. As the Eleventh Circuit recently explained, "*Lopez* did not alter our approach to determining whether a particular statute falls within the scope of Congress's Commerce Clause authority.... When ruling on a Commerce Clause challenge, we must determine, as always, 'whether a rational basis existed for concluding that a regulated activity sufficiently affected interstate commerce.'" *United States v. Wright*, 117 F.3d 1265, 1269 (11th Cir.1997) (*quoting Lopez*, 514 U.S. at 557, 115 S.Ct. at 1628-29); *see also Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276, 101 S.Ct. 2352, 2360, 69 L.Ed.2d 1 (1981) ("The task of a court that is asked to determine whether a particular exercise of congressional power is valid under the Commerce Clause is relatively narrow. The court must defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding.") (citations omitted) (quoted in *Terry*, 101 F.3d at 1416).

Congress could rationally conclude that the intrastate activity regulated by section 9 of the ESA substantially affects interstate commerce for two primary reasons. First, the provision prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it. Second, the provision controls adverse

effects of interstate competition.[10]

1. *Biodiversity*

Approximately 521 of the 1082 species in the United States currently designated as threatened or endangered are found in only one state. *See* Brief of Amici Curiae for Appellees at 20-21. The elimination of all or even some of these endangered species would have a staggering effect on biodiversity-- defined as the presence of a large number of species of animals and plants--in the United States and, thereby, on the current and future interstate commerce that

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[10] Judge Sentelle asserts that these rationales have "no stopping point." *See* Diss. op. at 1065, 1066. In fact, however, they have very clear and obvious limits. In the case of the first rationale, the argument stops at endangered species. Activities that threaten a species' existence threaten to reduce biodiversity and thereby have a substantial negative effect on interstate commerce. Thus, the biodiversity rationale offered here provides support for the Endangered Species Act only insofar as the Act prevents activities that are likely to cause the elimination of species. In the case of the second rationale, the argument stops at activities that are the product of destructive interstate competition. Under this rationale, interstate competition that is likely to produce destructive results, such as elimination of endangered species' habitat, environmental degradation, or exploitation of labor, can be regulated by Congress. Thus, the destructive interstate competition rationale provides support for the Endangered Species Act only insofar as the Act prevents a bidding down of regulatory standards that is likely to result in the elimination of endangered species' habitat.

relies on the availability of a diverse array of species.

The variety of plants and animals in this country are, in a sense, a natural resource that commercial actors can use toproduce marketable products. In the most narrow view of economic value, endangered plants and animals are valuable as sources of medicine and genes.[11] Fifty percent of the most frequently prescribed medicines are derived

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[11] This is a necessarily constrained view of the "value" of biodiversity. Endangered species of course have value beyond the profit they can produce as sources of medicine and genes. For example, tourists travel to see them, scientists study and learn from them, and people get aesthetic pleasure from them. In addition, every species offers some clues to the path of the evolutionary chain that produced it and to the role of certain genes also found in humans. For instance, researchers have recently concluded that basic research into the genes of the common fruit fly " 'can yield crucial clues to human development.' " Jennifer Ackerman, Journey to the Center of the Egg, N.Y. TIMES, Oct. 12, 1997, § 6, at 45 (quoting biologist Christiane Nusslein-Volhard). Moreover, every species has a place in the ecosystem. Extinction of a species can therefore have an important effect on the larger system of which it is a part. As biologist Edward O. Wilson explained:

> ...The traditional econometric approach, weighing market price and tourist dollars, will always underestimate the true value of wild species. None has been totally assayed for all of the commercial profit, scientific knowledge, and aesthetic pleasure it can yield. Furthermore, none exists in the wild all by itself. Every species is part of an ecosystem, an expert specialist of its

from wild plant and animal species.[12] Such medicines were estimated in 1983 to be worth over $15 billion a year. *See Id.* at 11. In addition, the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity. As Amici Curiae explained: "Fortifying the genetic diversity of U.S. crops played a large part in the explosive growth in farm production since the 1930s, accounting for at least one-half of the doubling in yields of rice, soybeans, wheat, and sugarcane, and a three-fold increase in corn and potatoes. Genetic diversity provided by wild plants also protects domestic crops from disease and pest damage." *Id.* at 12. Similar genetic engineering can be used with animals. For instance, it is not beyond the realm of possibility that the genes of a wild pollinator species like the Fly might be inbred with the honeybee, which currently pollinates most major U.S. crops, to produce a pollinator that is more disease resistant.

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[11] **(continued)** kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of the larger assemblage.

EDWARD O. WILSON, THE DIVERSITY OF LIFE 308 (1992).

[12] For example, the venom of a species of South American pit viper led to the discovery of the angiotensin system that regulates blood pressure in human beings. This helped scientists devise a molecule that alters blood pressure and is the preferred prescription drug for hypertension, bringing the pharmaceutical company that manufactures it

Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes. Unlike most other natural resources, however, the full value of the variety of plant and animal life that currently exists is uncertain. Plants and animals that are lost through extinction undoubtedly have economic uses that are, in some cases, as yet unknown but which could prove vitally important in the future.[13] A species whose worth is still unmeasured has what economists call an "option value"--the value of the possibility that a future discovery will make useful a species that is currently thought of as

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[12] **(continued)** $1.3 billion a year in sales. BIODIVERSITY II: UNDERSTANDING AND PROTECTING OUR BIOLOGICAL RESOURCES 9 (Marjoie L. Reaka-Kudla et al. eds.1997). Similarly, the saliva of the leech led to the development of the anticoagulant hirudin, which is used to treat hemorrhoids, rheumatism, thrombosis, and contusions and to dissolve blood clots that threaten skin transplants, and a substance derived from the saliva of the vampire bat of Central and South America is being developed to open clogged arteries and thereby prevent heart attacks. *See* WILSON, *supra* note 11, at 285-86.

[13] Some of the most important medical products derive from organisms that were once considered worthless or nearly so. For example, Penicillium mold, which "sparked the concept of antibiotics," was at one time valued only for the flavor it added to blue cheeses. *See* BIODIVERSITY II, *supra* note 12, at 9.

useless. *See* Bryan Nolan, COMMODITY, AMENITY, AND MORALITY: *The Limits of Quantification in Valuing Biodiveristy, in* BIODIVERSITY 200, 202 (Edward O. Wilson ed., 1988). To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species. Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce.[14] *See* Alan Randall, *What Mainstream Economists Have to Say about the Value of Biodiversity,* in BIODIVERSITY, *supra,* at 217. In the aggregate, however, we can be certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce.

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[14] Both Judge Sentelle and Judge Henderson appear to misunderstand this argument. *See* Conc. op. at 1058; Diss. op. at 1064. Although both quote the statement it is "impossible to calculate the exact impact" of the extinction of a single species, both ignore the second half of the argument: that in the aggregate we can be certain that a decline in biodiversity will have a "real and predictable " effect on interstate commerce. As a result of this omission, both misportray the argument as claiming that the extinction of a single endangered species, by itself, has a substantial effect on interstate commerce. Indeed, Judge Sentelle goes so far as to describe the argument as follows: "because of some undetermined and indeed undeterminable possibility that the fly might produce something at some undefined and

The few federal courts that have considered post-*Lopez* Commerce Clause challenges to federal wildlife protection have found that the extinction of animals substantially affects interstate commerce.[15] In *United States v. Bramble*, 103 F.3d 1475 (9th Cir.1996),

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[14] **(continued)** undetermined future time which might have some undefined and undeterminable medical value, which in turn might affect interstate commerce at that imagined future point, Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct." Diss. op. at 1064. This is inaccurate. To the contrary, the argument is that because biodiversity has a real, substantial, and predictable effect on both the current and future interstate commerce, "the de minimis character of individual instances arising under [the ESA] is of no consequence." *Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629. In other words, because we know that in the aggregate the extinction of endangered species will have a substantial effect on interstate commerce, it does not matter that it is "impossible to calculate the exact impact" of the extinction of a single species such as the Fly.

[15] Prior to *Lopez*, the federal courts repeatedly concluded that congressional efforts at protecting endangered and migratory species are constitutional under the Commerce Clause. *See Andrus v. Allard*, 444 U.S. 51, 63-64 n. 19, 100 S.Ct. 318, 325-26 n. 19, 62 L.Ed.2d 210 (1979) (discussing Migratory Bird Treaty Act and noting that the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *Leslie Salt Co. v. United States*, 896 F.2d 354, 360 (9th Cir.1990) *("Leslie I"), cert. denied*, 498 U.S. 1126, 111 S.Ct. 1089, 112 L.Ed.2d 1194 (1991) ("The commerce

the Ninth Circuit held that the Eagle Protection Act was a valid exercise of Congress' Commerce Clause power because "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity." *Id.* at 1481; *see also United States v. Lundquist*, 932 F.Supp. 1237, 1245 (D.Or.1996) (holding that "the possession of eagle parts is an activity which affects a broad regulatory scheme relating to commercial transactions and which, when viewed in the aggregate with similar activities nationwide, substantially affects interstate commerce") (citing *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630-31). Similarly, in *United States v. Romano*, 929 F.Supp. 502, 507-09 (D.Mass.1996), the District Court of Massachusetts upheld the Lacey Act, 16 U.S.C. §§ 3371-78, which prohibits any person from importing, exporting, transporting, selling, receiving, acquiring, or purchasing in interstate or foreign commerce any fish or wildlife taken, possessed, transported, or sold in violation of state or foreign law. Citing Congress' findings that the protection of endangered species protects future commercial activity,

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[15] **(continued)** clause power ... is broad enough to extend [federal] jurisdiction to local waters which may provide habitat to migratory birds and endangered species."), *cert. denied*, 498 U.S. 1126, 111 S.Ct. 1089, 112 L.Ed.2d 1194 (1991); *Id.* at 361 n. 1 (Rymer, J., concurring) ("Congress does have power under the Commerce Clause to regulate wildlife and endangered species."); *Leslie Salt Co. v. United States*, 55F.3d 1388, 1396 (9th Cir.) (*declining to reconsider Leslie I), cert. denied*, --- U.S. ----, 116 S.Ct. 407, 133 L.Ed.2d 325 (1995); *see also Hughes v. Oklahoma*, 441 U.S. 322, 329-36, 99 S.Ct. 1727, 1732-36, 60 L.Ed.2d 250 (1979) (holding that state regulations of intrastate wildlife are within dormant Commerce Clause).

the court held that the Act was within Congress' Commerce Clause power. *See Romano*, 929 F.Supp. at 508.[16]

I join these courts in concluding that the extinction of animals substantially affects interstate commerce. More specifically, I find that the scientific evidence that is currently available provides sufficient support for Congress' conclusion that regulation of the "taking" of endangered animals is within its Commerce Clause power because such takings, if permitted, would have a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource--biodiversity.

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[16] The District Court of Hawaii relied on a similar reasoning in an earlier case involving a Commerce Clause challenge to the ESA, *Palila v. Hawaii Dept. of Land and Natural Resources*, 471 F.Supp. 985 (D.Haw.1979), *aff'd*, 639 F.2d 495 (9th Cir.1981). In that case, the court pointed to the interstate commerce effects of protecting endangered species to support its decision to uphold the Endangered Species Act. The court explained: "In this context, a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction." *Id.* at 995. The court thus concluded that the state's program of preserving herds of "wild" sheep and goats which destroyed the habitat of an endangered bird constituted an unlawful "taking" of the bird by the state. *Id.*

2. *Destructive Interstate Competition*

The taking of the Fly and other endangered animals can also be regulated by Congress as an activity that substantially affects interstate commerce because it is the product of destructive interstate competition. It is a principle deeply rooted in Commerce Clause jurisprudence that Congress is empowered to act to prevent destructive interstate competition. As the Supreme Court explained in *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981) *("Hodel v. Virginia")*, a case that the *Lopez* Court cited repeatedly, "prevention of ... destructive interstate competition is a traditional role for congressional action under the Commerce Clause." *Id.* at 282, 101 S.Ct. at 2363.

The case at hand bears a substantial similarity to the three cases in which the Supreme Court best articulated the principle that Congress may act to prevent interstate competition that has a destructive effect: *Hodel v. Virginia*, 452 U.S. 264, 101 S.Ct. 2352, *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981) *("Hodel v. Indiana")*, and *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941). In *Hodel v. Virginia*, the Supreme Court considered a challenge to the constitutionality of the Surface Mining Control and Reclamation Act of 1977. The Surface Mining Act required mine operators to restore the land after mining to its prior condition, including its approximate original contour, topsoil, hydrologic balance, and vegetation in order to "protect society and the environment from the adverse effects of surface coal mining operations." 452 U.S. at 268, 101 S.Ct. at 2356. An association of coal producers in Virginia challenged the Act, which it claimed "regulat[ed]

the use of private lands within the borders of the States," as beyond Congress' Commerce Clause power. *Id.* at 275, 101 S.Ct. at 2359. The Court held that the Act was a valid exercise of Congress' power under the Commerce Clause because "Congress rationally determined that regulation of surface coal mining is necessary to protect interstate commerce from adverse effects that may result from that activity." *Id.* at 281, 101 S.Ct. at 2363. Moreover, the Court concluded that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Id.* at 282, 101 S.Ct. at 2363.

The parallels between *Hodel v. Virginia* and the case at hand are obvious. The ESA and the Surface Mining Act both regulate activities--destruction of endangered species and destruction of the natural landscape--that are carried out entirely within a State and which are not themselves commercial in character. The activities, however, may be regulated because they have destructive effects, on environmental quality in one case and on the availability of a variety of species in the other, that are likely to affect more than one State.[17] In each case, moreover, interstate competition provides incentives to states to adopt lower standards to gain an advantage vis-a-vis other states: In *Hodel v. Virginia*, 452 U.S. 264, 101 S.Ct. 2352, the states were motivated to adopt lower environmental standards to improve the competitiveness of their coal production

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[17] *See supra* subsection II.B.1 for a discussion of how biodiversity affects interstate commerce.

facilities, and in this case, the states are motivated to adopt lower standards of endangered species protection in order to attract development.[18]

The Supreme Court adopted similar reasoning in *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40, which was decided on the same day as *Hodel v. Virginia,* and involved a challenge to different provisions of the same Act. *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40, involved a constitutional challenge to the"prime farmland" provisions of the Surface Mining Act, which established special requirements for surface coal mining operations conducted on land that qualified as prime farmland and that had historically been used as cropland.

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[18] In his dissent, Judge Sentelle attempts to distinguish *Hodel v. Virginia,* 452 U.S. 264, 101 S.Ct. 2352, *Hodel v. Indiana,* 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40, and *United States v. Darby,* 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, from the case at hand by asserting that "[i]n the present case neither Congress nor the litigants, nor for that matter Judge Wald, has pointed to any commercial activity being regulated, any commercial competition being unfairly challenged, or any other sort of commerce being destroyed by the taking of the fly." Diss. op. at 1066. Again, this is inaccurate. In addition to arguing that a decline in biodiversity would have a substantial and predictable destructive effect on interstate commerce, *see supra* subsection II.B.1, this section of the opinion refers repeatedly to the fact that the ESA regulates the conditions under which development takes place, and thereby prevents states from adopting lower standards of endangered species protection in order to attract development (e.g., construction of a hospital, power plant, and intersection)--activity that even Judge Sentelle presumably would admit is commercial in nature.

The Court held that the provisions did not violate the Commerce Clause. The Act was adopted, the Court explained, "to ensure that production of coal for interstate commerce would not be at the expense of agriculture, the environment, or public health and safety, injury to any of which interests would have deleterious effects on interstate commerce." *Id.* at 329, 101 S.Ct. at 2385-86. Moreover, the Court noted, the Act reflected a congressional desire to "protect[ ] mine operators in States adhering to high ... standards from disadvantageous competition with operators in States with less rigorous regulatory programs." *Id.*

The parallels between *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40, and the case at hand are again striking. In both cases, the statutes under challenge regulated intrastate activity that is not itself commercial and that can be carried out entirely within a State: the destruction of farmland and the destruction of endangered species. Just as the prime farmland provisions of the Surface Mining Act were adopted to protect agriculture, the environment, and health and safety, injury to which would have deleterious effects on interstate commerce, section 9(a)(1) of the ESA was adopted to ensure that "growth and development," H.R. 37 ("Endangered and Threatened Species Conservation Act of 1973") (Findings, Purpose, and Policy), *reprinted at* 119 CONG. REC. 25,694, 25,694 (1973), would not be at the expense of the conservation and protection of a variety of species, injury to which would have equally deleterious consequences for interstate

commerce. [19] Thus, in both cases, the activity at issue may be regulated because it is likely to have destructive effects on interstate commerce.

Finally, the Supreme Court's decision in *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941), also concluded that activity could be regulated under the Commerce Clause if it involved destructive interstate competition. In *Darby*, the Court upheld wage and hour regulations for employees engaged in the production of lumber for interstate commerce. Although the statute "undertakes to regulate wages and hours within the state contrary to the policy of the state which has elected to leave them unregulated," 312 U.S. at 114, 61 S.Ct. at 457, the Court held that the statute was within the Commerce Clause power because it was necessary to control destructive interstate competition. The Court explained that "Congress, following its own conception of public policy concerning the restrictions which may be appropriately imposed on interstate commerce, is free to exclude from the commerce articles whose use in the states for which they are destined it may conceive to be injurious to the public health, morals or welfare, even though the state has not sought to regulate their use." *Id.* (citations omitted). The Court further explained that "interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions, which competition is injurious to the commerce and to the states from and to which the commerce flows." *Id.* at 115, 61 S.Ct. at 457.

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[19] *See Id.*

Like *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609, the case at hand involves a regulation of the conditions under which commercial activity takes place. The statute in *Darby* regulated the wages and hours of workers in Georgia who were engaged in producing lumber for interstate commerce. Similarly, the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population. In both cases, Congress passed the statute in part to prevent states from gaining a competitive advantage by enacting lower regulatory standards than other states. Congress was aware that no state could be expected to require significantly more rigorous labor standards or endangered species protection than other states, because for each individual state, the cost of providing better working conditions or preserving a species outweighs the benefits even though in aggregate, the benefits of better labor standards and biodiversity outweigh the costs.[20]

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[20] Indeed, both the House and Senate recognized this as a reason for passing the Endangered Species Act. In its Declaration of Policy, the Senate stated as follows:

> . . . .The Congress finds and declares that--
>
> (1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;
>
> . . . .
>
> (5) encouraging the States, through

As the cases discussed above illustrate, the Court has long held that Congress has the power under the Commerce Clause to prevent destructive interstate commerce similar to that at issue in this case. I therefore find that Congress has

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[20] **(continued)** Federal financial assistance and a system of incentives, to develop and maintain conservation, protection, restoration, and propagation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish and wildlife.

S.1983 ("Endangered Species Act of 1973") (Declaration of Policy), *reprinted at* 119 CONG. REC. 30,157, 30,157 (1973). Similarly, in its declaration of findings, purpose, and policy, the House stated:

> . . . The Congress finds and declares that one of the unfortunate consequences of growth and development in the United States and elsewhere has been the extermination of some species or subspecies of fish, wildlife, and plants; that serious losses in species of wild animals with educational, historical, recreational, and scientific value have occurred and are occurring ...; that a key to more effective protection and management of native fish and wildlife that are endangered or threatened is to encourage and assist the States in developing programs for such fish and wildlife; and that the conservation, protection, restoration, or propagation of such species will inure to the benefit of all citizens.

H.R. 37 ("Endangered and Threatened Species Conservation Act of 1973") (Findings, Purpose, and Policy), *reprinted at* 119 CONG. REC.25,694, 25,694 (1973).

the power to prevent interstate competition that will result in the destruction of endangered species just as it has the power to prevent interstate competition that will result in harm to the environment, *Hodel v. Virginia*, 452 U.S. 264, 101 S.Ct. 2352, the destruction of "prime farm land," *Hodel v. Indiana*, 452 U.S. at 324, 101 S.Ct. at 2383, or the employment of people under substandard labor conditions, *Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609.

III. CONCLUSION

We hold that the section 9(a)(1) of the Endangered Species Act is within Congress' Commerce Clause power and that the Fish and Wildlife Service's application of the provision to the Delhi Sands Flower-Loving Fly was therefore constitutional.[21] The district court's decision granting the Government's motion for summary judgment is therefore

Affirmed.

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[21] In the conclusion to his dissent, Judge Sentelle quotes a portion of Justice Story's Commentaries on the Constitution. *See* Diss. op. at 1067. Justice Story was undoubtedly an eloquent and brilliant scholar. As Justice Thomas recently noted, however, Justice Story's views "represent only his own understanding" of the Constitution. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 856, 115 S.Ct. 1842, 1880, 131 L.Ed.2d 881 (1995) (Thomas, J., dissenting). Today few would agree with Justice Story's claim that the "power to regulate manufactures" falls outside Congress' Commerce Clause power. Indeed, the *Lopez* Court clearly established the principle that where activity, including manufacturing

KAREN LECRAFT HENDERSON, *Circuit Judge*, concurring:

I agree with Judge Wald's conclusion that the "taking" prohibition in section 9(a)(1) of the Endangered Species Act (ESA) constitutes a valid exercise of the Congress's authority to regulate interstate commerce under the Commerce Clause.[1] I cannot, however, agree entirely with either of her grounds for reaching the result and instead arrive by a different route.

Judge Wald first asserts that section 9(a)(1) is a proper regulation of the "channels of commerce." In support she cites decisions upholding regulation of commercially

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[21] **(continued)** activity, "substantially affects interstate commerce, legislation regulating that activity will be sustained." *Lopez*, 514 U.S. at 560, 115 S.Ct. at 1630.

[1] It is beyond question that the development San Bernardino County proposes is not only a "discomfit[ure]"of the Delhi Sands Flower-Loving Fly, *see* Dissent at 1060, but also a "taking" within the meaning of ESA, *see Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 691, 115 S.Ct. 2407, 2409-10, 132 L.Ed.2d 597 (1995) (upholding Department of Interior's interpretation in 50 C.F.R. § 17.3 of statutory definition of "take" to include "an act which actually kills or injures wildlife," which "may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering"). Further, the extent of inconvenience the County experiences if the unlawful taking is prevented, *see* Dissent at 1060-1061, is irrelevant so long as the prevention is authorized under the Commerce Clause.

marketable goods, such as machine guns and lumber,[2] and public accommodations.[3] In each case, the object of regulation was necessarily connected to movement of persons or things interstate and could therefore be characterized as regulation of the channels of commerce. Not so with an endangered species, as the facts here graphically demonstrate. The Delhi Sands Flower-Loving Flies the Department of the Interior seeks to protect are (along with many other species no doubt) entirely intrastate creatures. They do not move among states either on their own or through human agency. As a result, like the Gun-Free School Zones Act in *Lopez*, the statutory protection of the flies "is not a regulation of the use of the channels of interstate commerce." 514 U.S. at 559, 115 S.Ct. at 1630.

Judge Wald also justifies the protection of endangered species on the ground that the loss of biodiversity "substantially affects" interstate commerce because of the resulting loss of potential medical or economic benefit. Yet her opinion acknowledges that it is "impossible to calculate the exact impact" of the economic loss of an endangered species. Wald Op. at 1053. As far as I can tell, it is equally impossible to ascertain that there will be any such impact at all. It may well be that no species endangered now or in the future will have any of the economic value proposed.

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[2] *United States v. Rambo*, 74 F.3d 948 (9th Cir.1996); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941).

[3] *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964).

Given that possibility, I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value. Nevertheless, I believe that the loss of biodiversity itself has a substantial effect on our ecosystem[4] and likewise on interstate commerce. In addition, I would uphold section 9(a)(1) as applied here because the Department's protection of the flies regulates and substantially affects commercial development activity which is plainly interstate.

First, I agree with Judge Wald that biodiversity is important to our understanding of ESA and its relation to interstate commerce. As Judge Wald's opinion notes:

> Every species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of a larger assemblage.

Wald Op. at 1052 n. 11 (quoting Edward O. Wilson, *The Diversity of Life* 308 (1992)). The effect of a species' continued existence on the health of other species within the ecosystem seems to be generally recognized among

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[4] An ecosystem consists of "[t]he organisms in a community plus the associated abiotic factors with which they interact." Helena Curtis & N. Sue Barnes, *Biology* glossary at G-7 (5th ed.1989).

scientists. *See* Stephen M. Johnson, *United States v. Lopez: A Misstep, but Hardly Epochal for Federal Environmental Regulation,* 5 N.Y.U. Envtl. L.J. 33, 79 (1996) ("It is a fundamental principle of ecology that ecosystems are composed of interdependent parts that play vital roles in preserving the ecosystem. As an ecosystem becomes less diverse, it becomes less adaptable to stresses that are placed on it.") (footnotes omitted); Myrl L. Duncan, *Property as a Public Conversation, Not a Lockean Soliloquy: A Role for Intellectual and Legal History in Takings Analysis,* 26 Envtl. L. 1095, 1129 (1996) ("[S]cientists have rediscovered that the world cannot meaningfully be broken down into isolated parts, that every part is connected to every other part. Perhaps the strongest statements about interconnectedness come from scientists, scholars, and regulators working in the field of conservation biology who are critical of the species-by-species, reaction-to-crisis approach taken by the Endangered Species Act. They understand that species protection issues cannot be separated from those of ecosystem health.") (footnotes omitted). Some studies show, for example, that the mere presence of diverse species within an ecosystem (biodiversity) by itself contributes to the ecosystem's fecundity. *See* Yvonne Baskin, *Ecologists Dare to Ask: How Much Does Diversity Matter?* 264 Science 202 (1994). The Congress recognized the interconnection of the various species and the ecosystems when it declared that the "essential purpose" of ESA, which protects endangered species, is in fact "to protect the ecosystem upon which we and other species depend." H.R.Rep. No. 93-412, at 10 (1973); see also 16 U.S.C. § 1531 (finding that endangered species "are of aesthetic, ecological, educational, historical, recreational, and scientific value") (emphasis added); *cf.* 16 U.S.C. § 1361(5)(B) (congressional finding in support of

Marine Mammal Protection Act of 1972 that "marine mammals ... affect the balance of marine ecosystems in a manner which is important to other animals and other animal products which move in interstate commerce, and that the protection and conservation of marine mammals and their habitats is therefore necessary to insure the continuing availability of those products which move in interstate commerce"). Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce. There is, therefore, "a rational basis" for concluding that the "taking" of endangered species "substantially affects" interstate commerce so that section 9(a)(1) is within the Congress's Commerce Clause authority. *See Lopez*, 514 U.S. at 557-59, 115 S.Ct. at 1629.

The interstate effect of a taking is particularly obvious here given the nature of the taking the County proposes. In enacting ESA, the Congress expressed an intent to protect not only endangered species but also the habitats that they, and we, occupy. *See* H.R.Rep. No. 93-412, at 10 (1973) (identifying ESA's "essential purpose" as "to protect the ecosystem upon which we and other species depend"); S.Rep. No. 93-307 at 4, U.S.Code Cong. & Admin. News at 2989, 2992 ("Often, protection of habitat is the only means of protecting endangered animals which occur on nonpublic lands."); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 703-09, 115 S.Ct. 2407, 2416-18, 132 L.Ed.2d 597 (1995) (statutory definition of "take" as "harm" encompasses habitat modification). At the same time, the Congress expressly found that "economic

growth and development untempered by adequate concern and conservation" was the cause for "various species of fish, wildlife, and plants in the United States hav[ing] been rendered extinct." 16 U.S.C. § 1531(a)(1). It is plain, then, that at the time it passed ESA the Congress contemplated protecting endangered species through regulation of land and its development, which is precisely what the Department has attempted to do here. Such regulation, apart from the characteristics or range of the specific endangered species involved, has a plain and substantial effect on interstate commerce. In this case the regulation relates to both the proposed redesigned traffic intersection and the hospital it is intended to serve, each of which has an obvious connection with interstate commerce. *See Terry v. Reno*, 101 F.3d 1412, 1416-17 (D.C.Cir.1996) (concluding abortion clinic activities substantially affect interstate commerce); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 271, 85 S.Ct. 348, 364-65, 13 L.Ed.2d 258 (1964) (concluding that "facilities and instrumentalities used to carry on [interstate] commerce, such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms") (emphasis added).[5] Insofar as application of section 9(a)(1) of ESA here acts to regulate commercial development of the land inhabited by the endangered species, "it may ... be reached by Congress" because "it asserts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942), *quoted*

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[5] In light of these authorities I cannot agree with my dissenting colleague that "[t]he activity regulated in the present case involves" only "local land use." Dissent at 1064.

in United States v. Lopez, 514 U.S. 549, 556, 115 S.Ct. 1624, 1628, 131 L.Ed.2d 626 (1995).[6]

For the preceding reasons I believe that the Department of the Interior's regulation of the County's proposed "taking" of the endangered Delhi Sands Flower-Loving Fly, pursuant to section 9(a)(1) of ESA, is a lawful exercise of governmental authority under the Commerce Clause.[7]

SENTELLE, *Circuit Judge, dissenting*:

This case concerns the efforts of San Bernardino County, California ("the County"), to construct a hospital and supporting infrastructure for its citizens and other humans. Unfortunately, those efforts discomfit an insect-- the Delhi Sands Flower-Loving Fly. According to the parties

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[6] The dissent suggests this justification has no "stopping point" as required by *Lopez*. *See* Dissent at 1064-1065; *Lopez*, 514 U.S. at 564, 115 S.Ct. at 1632. In *Lopez* the Court was concerned that the "theories" offered by the government would authorize regulation of "all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce" and "any activity that it found was related to the economic productivity of individual citizens." *Id.* The rationale on which I rely permits regulation only of activities (including land use) that adversely affect species that affect, or are involved in, interstate commerce.

[7] In so concluding, I note that neither the Supreme Court nor any circuit court has used *Lopez* to strike down an attempted regulation outside the criminal arena. For cases rejecting post-*Lopez* challenges to noncriminal statutes, *see* Wald Op. at 1064-1065.

individuals of this species, all located within forty square in this case, there are fewer than 300 breeding miles in southern California. These flies live as larvae for nearly two years under Delhi Sands, a particular type of grit, apparently found only in those forty square miles of southern California, after which they emerge to feed and breed for two weeks before dying.

In 1982, the County began considering construction of a $470 million "state- of-the-art," "earthquake-proof" hospital complex. The day before ground breaking was scheduled to occur in 1993, the U.S. Fish and Wildlife Service ("Service") of the Department of the Interior ("Interior") added the fly to the endangered species list and notified the County that construction of the hospital, on County land using County funds, would harm a colony of six to eight flies and would therefore violate federal law. To prevent being prosecuted by the Service, County officials were forced to move the hospital complex 250 feet northward and to set aside 8 acres of land for the fly, delaying construction for a year and costing County taxpayers around $3.5 million. The Service also imposed a variety of other stringent requirements, including preservation of a flight corridor for the insect which today prevents improvements to a traffic intersection necessary to allow emergency access and avoid "virtual gridlock" when the hospital opens. At one point, the Service threatened to require shutting down the eight-lane San Bernardino Freeway (U.S. 10, one of the most heavily traveled in southern California) for two months every year (I am not making this up). It did later drop this demand. The Service has also impeded several localities from complying with County-mandated weed-control programs which are an integral part of preventing brush fires in the area.

Construction planning and projects, including an electrical substation and housing developments, have also been threatened, impeded, or prohibited because of the fly. Local land-use planning, including the authority to balance environmental concerns with development in a way to best serve citizens' interests, has been disrupted; the financial health of the local governments has been impacted; a local enterprise zone has been threatened; and private land development has been impeded.

STATUTORY JUSTIFICATION

What business, one might ask, does the federal government have disrupting these activities of the unit of local government, which range from the purely local to the generally local in nature? The government's answer begins with a statutory justification. It acts under the authority conferred upon it by the Endangered Species Act ("ESA"), specifically, section 9(a)(1) of that Act, which makes it unlawful, *inter alia*, to "(B) take any such species within the United States or the territorial seas of the United States." 16 U.S.C. § 1538(a)(1)(B). Next, one might ask, what does that statute have to do with the regulation of the County's activities in building a hospital and the supporting infrastructure? It is not apparent that the hospital plans to "take" any insects, or any other species. It proposes to construct structures for human use, and the humans using those structures propose to drive automobiles, each of which might disturb the fly, but would not entail anything that most users of the English language would recognize as "taking" the fly. Unfortunately for the County and its citizens, however, the Secretary of the Interior has determined that the word "take" includes within its definition "harm" and, therefore, activities which alter the

habitat of an endangered species are covered by the statute prohibiting the taking of that species since the habitat modification might harm it. Even more unfortunately for the County and the citizens, the Supreme Court has agreed with that expansive definition of "take." *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995). Therefore, we may take it as a given that the statute forbidding the taking of endangered species can be used, provided it passes constitutional muster, to prevent counties and their citizens from building hospitals or from driving to those hospitals by routes in which the bugs smashed upon their windshields might turn out to include the Delhi Sands Flower-Loving Fly or some other species of rare insect. That leaves the question for today as: by what constitutional justification does the federal government purport to regulate local activities that might disturb a local fly?

THE CONSTITUTIONAL JUSTIFICATIONS

The Department of Interior asserts that section 9(a)(1)(B) of the ESA, and specifically its use of that section to prohibit activities in southern California which might disturb a fly existing only in southern California, are constitutional under the Commerce Clause. U.S. CONST.. Art. I, § 8, cl. 3. That clause empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." This brings the next question: Can Congress under the Interstate Commerce Clause regulate the killing of flies, which is not commerce, in southern California, which is not interstate? Because I think the answer is "no," I can not join my colleagues' decision to affirm the district court's conclusion that it can.

ANALYSIS

The proposition that the federal government can, under the Interstate Commerce Clause, regulate an activity which is neither interstate nor commerce, reminds me of the old chestnut: If we had some ham, we could fix some ham and eggs, if we had some eggs. With neither ham nor eggs, the chances of fixing a recognizable meal requiring both amount to nil. Similarly, the chances of validly regulating something which is neither commerce nor interstate under the heading of the interstate commerce power must likewise be an empty recitation. I recognize that for some decades of jurisprudential development, the Commerce Clause has been used as the justification for the regulation of a plethora of activities not apparently within its text. *See, e.g., Wickard v. Filburn*, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (regulating the consumption of home-grown wheat). So wide-ranging has been the application of the Clause as to prompt one writer to "wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'hey-you-can-do-whatever-you-feel-like clause.' " Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARV.. J.L. PUB. POL. 1, 5 (1995). However, in 1995, the Supreme Court brought an end to the galactic growth of the Clause's application and reminded Congress that the words of that Clause, like the rest of the Constitution, have content, in *United States v. Lopez*, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995). While I would have found the present application of the ESA to be outside the enumerated powers of Congress under the Commerce Clause even in the world before *Lopez*, after that controlling decision, I think there can be no doubt.

In *Lopez*, the Supreme Court considered the constitutionality of the Gun-Free School Zones Act of 1990, in which Congress made it a federal offense "for any individual knowingly to possess a firearm at a place that the individual knows, or has reasonable cause to believe, is a school zone." 18 U.S.C. § 922(q)(1)(A) (Supp. V 1988). The Court concluded that because "[t]he Act neither regulates a commercial activity nor contains a requirement that the possession be connected in any way to interstate commerce," the statute "exceeds the authority of Congress" to regulate commerce under the Interstate Commerce Clause. 514 U.S. at 551, 115 S.Ct. at 1626. For the same reasons, I would hold that the challenged subsection of the ESA likewise exceeds that authority.

First, ESA section 9(a)(1)(B), like the statute challenged in *Lopez*, does not regulate commerce. In *Lopez*, the Supreme Court repaired to first principles. It reminded us that the Commerce Clause, unsurprisingly, regulates "commerce," and that "commerce ... is traffic ... it is intercourse ... commercial intercourse between nations, and parts of nations," as relevant here, between states. *Id.* at 553, 115 S.Ct. at 1627 (*quoting Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1, 189-190, 6 L.Ed. 23 (1824)). The *Lopez* Court then went on to analyze the developments of Commerce Clause jurisprudence through the next 171 years after *Gibbons v. Ogden*. Specifically, the Court noted such significant developments as the enactment of the Interstate Commerce Act, 24 Stat. 379 (1887), and the Sherman Antitrust Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 *et seq.*, and the era of federal regulation which they ushered into our jurisprudence. Coupling this with the development of the negative Commerce Clause, *see* authorities collected in Lopez, 514 U.S. at 554, 115 S.Ct. at

1627, the *Lopez* Court traced Commerce Clause jurisprudence to *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 57 S.Ct. 615, 81 L.Ed. 893 (1937), and the growing extension of congressional authority to the regulation of essentially intrastate activities that " 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' [which] are within Congress' power to regulate." *Lopez*, 514 U.S. at 555, 115 S.Ct. at 1628 (quoting *Jones & Laughlin Steel*, 301 U.S. at 37, 57 S.Ct. at 624). Following that through *Wickard v. Filburn*, *supra*, the *Lopez* Court finally analyzed the present state of our commerce jurisprudence.

The Court identified "three broad categories of activity that Congress may regulate under its commerce power." *Id.* at 558-59, 115 S.Ct. at 1629. Under the Lopez analysis, these three categories are: (1) "Congress may regulate the use of the channels of interstate commerce"; (2) "Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; (3) "Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce." *Id.* (citations omitted). My colleagues and I agree that *Lopez* recognizes the limitation of the power of Congress to act under the Commerce Clause to these three categories. Opinion of Judge Wald ("Wald Op.") at 1045; Opinion of Judge Henderson ("Henderson Op.") at 1057. They further agree with each other that the federal government's actions in this case come within its Commerce Clause authority as defined in *Lopez*. They cannot, however, agree as to how it fits within the *Lopez* analysis.

I find this inability to agree unsurprising, as this effort to regulate does not fit any of those categories. First, category (2) of constitutional commerce regulation is definitely unavailable. Judge Wald expressly agrees that "section 9(a)(1) of the ESA is not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce." Wald Op. at 1045. Apparently Judge Henderson agrees *sub silentia*, as she never asserts the second category of Lopez analysis as a foundation for upholding this application of the Act. That said, we are left with potential justification of the Act only as regulation of the use of channels of interstate commerce or as an exercise of Congress' power to regulate those activities having a substantial relationship to interstate commerce. My colleagues accept differing arguments as to why one or both of those rationales underpins the exercise of federal authority over purely local actions disturbing a purely local fly.

Judge Wald first asserts that the action taken by the Service under section 9(a)(1)(B) is a constitutional regulation of "the use of the 'channels of interstate commerce.' " Wald Op. at 1046 (*quoting Lopez*, 514 U.S. at 558, 115 S.Ct. at 1629). The short disposition of this argument is to say it does not command a majority even without me. Judge Henderson rejects it out of hand, noting, correctly, that all authority offered by Judge Wald in support of the channels-of-commerce rationale upheld regulation "necessarily connected to movement of persons or things interstate...." Henderson Op. at 1057 (*citing United States v. Rambo*, 74 F.3d 948 (9th Cir.1995); *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1941); and *Heart of Atlanta Motel, Inc. v.*

United States, 379 U.S. 241, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964)). As Judge Henderson goes on to note, neither the whole of the endangered species, nor any of the individuals comprising it, travel interstate. The Delhi Sands Flower-Loving Fly is an inveterate stay-at-home, a purely intrastate creature. The Gun-Free School Zones Act, stricken as unconstitutional by the Supreme Court in *Lopez*, involved purely local possession of firearms, objects which do move in interstate commerce, presumably through its channels. The Supreme Court without difficulty determined that that section was "not a regulation of the use of the channels of interstate commerce." Neither is this. It does not purport to be.[1]

Not only do I join Judge Henderson in rejecting any claim that section 9(a)(1)(B) is constitutional as a proper

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[1] Judge Wald unsuccessfully attempts to distinguish *Lopez* by claiming that a prohibition against habitat destruction is "necessary to enable the government to control the transport of endangered species in interstate commerce." Wald Op. at 1046. The fly is not an article of interstate commerce, and does not travel the channels of commerce. The issue before us is not possession or sale of flies, but, essentially, destruction of flies. Congress may have the authority to prevent interstate transportation of flies, and that aspect of the ESA is not challenged here. But preventing destruction of local flies cannot reasonably be held to be either "necessary" or "proper" to keeping the channels of commerce free from their interstate transportation. While prohibiting the local possession and exchange of flies might arguably be necessary to preventing interstate transportation or exchange of flies, prohibiting destruction of fly habitat is not.

regulation of the channels of commerce, but I would go further than she and note that Judge Wald's supporting analysis of Darby and Heart of Atlanta is far off the mark.

As Judge Wald notes, both *Darby* and *Heart of Atlanta* concerned congressional efforts to "rid the channels of interstate commerce of injurious uses." Wald Op. at 1048. But, for reasons I have already described, *supra* n. 1, preventing habitat destruction contributes nothing to the goal of eliminating the fly, or any other endangered species, from the channels of commerce. The fact that activities like the construction of a hospital might involve articles that have traveled across state lines cannot justify federal regulation of the incidental local effects of every local activity in which those articles are employed. Judge Wald seems to be trying to extend Congress' power over the channels of commerce to allow direct federal regulation of any local effects caused by any activity using those channels of commerce. She focuses not on the fly in the channels of commerce, but everything else moving in the channels of commerce that may affect the fly. But this improperly inverts the third prong of *Lopez* and extends it without limit. Under Judge Wald's theory, instead of being limited to activities that substantially affect commerce, Congress may also regulate anything that is affected by commerce.

While Judge Henderson agrees with me that category (1) of *Lopez* regulation does not support the Department's position, she agrees with Judge Wald that the statutory protection of the flies can be justified under category (3): that is, that it is the regulation of "activities that substantially affect interstate commerce." *Lopez*, 514 U.S. at 558-59, 115 S.Ct. at 1629-30. Once again, however, my

colleagues cannot agree as to a rationale. Before responding to their differing opinions on why the regulation of intrastate fly killing falls within Congress' "power to regulate those activities having a substantial relation to interstate commerce," I pause to further elaborate the Supreme Court's analysis of that category of legitimate regulatory power from *Lopez*. Because category (3) was the only category which even arguably could have permitted Congress to regulate the purely intrastate possession of firearms considered in *Lopez*, the Supreme Court afforded it a more thorough analysis than the other two categories and, in so doing, established three areas of inquiry necessitated by a claim of interstate commerce authority under the "substantial effects" category. Thus, in considering whether or not to uphold regulation under that rationale, we must examine whether:

> -- the regulation controls a commercial activity, or an activity necessary to the regulation of some commercial activity;
>
> -- the statute includes a jurisdictional nexus requirement to ensure that each regulated instance of the activity affects interstate commerce; and
>
> -- the rationale offered to support the constitutionality of the statute (i.e., statutory findings, legislative history, arguments of counsel, or a reviewing court's own attribution of purposes to the statute being challenged) has a logical stopping point so that the rationale is not so broad as to regulate on a similar basis all human

endeavors, especially those traditionally regulated by the states.[2]

None of the rationales offered by my colleagues pass this examination. Judge Wald offers two possible explanations as to why the challenged regulatory activity falls within category (3). First, she puts forth the "biodiversity" rationale. Under this rationale, she argues that the extinction of a species, and the concomitant diminution of the pool of wild species, "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes." Wald Op. at 1053. As I understand her argument, because of some undetermined and indeed undeterminable possibility that the fly might produce something at some undefined and undetermined future time which might have some undefined and undeterminable medical value, which in turn might affect interstate commerce at that imagined future point, Congress can today regulate anything which might advance the pace at which the endangered species becomes extinct. Judge Henderson rejects this rationale, noting cogently that our colleague admits "that it is 'impossible to calculate the exact impact' of the economic loss of an endangered species," Henderson Op. at 1058 (quoting Wald Op. at 1053). Judge Henderson further notes that "it is equally impossible to ascertain that there will be any such impact at all." *Id.* She then reasons, and I agree, that we cannot then "say that the protection of an endangered species has any effect on interstate

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[2] This specific formulation of the inquiries necessary under category (3) is drawn from *United States v. Wall*, 92 F.3d 1444, 1455-56 (6th Cir.1996) (Boggs, J., dissenting in part). However, each of the points summarized in Judge Boggs's formulation is taken directly from *Lopez*, 514 U.S. at 559-65, 115 S.Ct. at 1629-33.

commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value." *Id.* I would further note that Judge Wald's first rationale fails under each of the subsidiary inquiries of category (3) discussed above.

First, the regulation does not control a commercial activity, or an activity necessary to the regulation of some commercial activity. Neither killing flies nor controlling weeds nor digging holes is either inherently or fundamentally commercial in any sense. Like the criminal statute struck down in *Lopez*, the challenged section of the ESA "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561, 115 S.Ct. at 1630-31. In applying that test in *Lopez*, the Supreme Court noted that "[s]ection 922(q) is a criminal statute" and that "under our federal system, the States possess primary authority for defining and enforcing the criminal law." *Id.* at 561 & n. 3, 115 S.Ct. at 1631 & n. 3 (citations and internal quotations omitted). The activity regulated in the present case involves local land use, a similar traditional stronghold of state authority.

As to the second subsidiary inquiry, the Supreme Court noted in *Lopez* that the statute before it contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearms possession in question affects interstate commerce." *Id.* at 561, 115 S.Ct. at 1631. Just so with the ESA. Nothing in section 9(a)(1)(B) of the Act or any other governing section requires that the regulated activity affect interstate commerce or provides any jurisdictional nexus supporting such a test. Like the statute in *Lopez*, it falls outside the

authority granted by the Commerce Clause.[3]

Third, the rationale offered by Judge Wald to support this intrastate application of a statute unlimited by either of the other two subsidiary inquiries has no logical stopping point. As Judge Henderson suggests, the rationale dependent upon the purely speculative future impact of an action with no demonstrable impact at all cannot be said to "ha[ve] any effect on interstate commerce (much less a substantial one)...." Henderson Op. at 1058. If it could, then I do not see how Congress could be prohibited from regulating any action that might conceivably affect the number or continued existence of any item whatsoever. A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce. There is no stopping point. If we uphold this statute under Judge Wald's first rationale, we have indeed not only ignored *Lopez* but made the Commerce Clause into what Judge Kozinski suggested: the "hey-you-can-do-whatever-you-feel-like clause." Kozinski, *supra.*

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[3] Judge Wald chides me for not discussing *Terry v. Reno*, 101 F.3d 1412 (D.C.Cir.1996), *cert. denied*, --- U.S. ----, 117 S.Ct. 2431, 138 L.Ed.2d 193 (1997). *See* Wald Op. at 1049 n. 8. In *Terry*, the effect on commercial activity was obvious--persons blocking access to clinics directly affected the business of abortion doctors serving interstate customers. The taking of a purely local fly, a harm without even a remote effect on commerce, cannot be reasonably likened to local activities undertaken with the purpose and effect of directly impeding interstate commerce.

Though Judge Henderson rejects Judge Wald's "biodiversity" rationale, she relies on a related justification of her own, which is to me indistinguishable in any meaningful way from that of Judge Wald. As I understand her rationale, it depends on "the interconnectedness of species and ecosystems," which she deems sufficient for us "to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species [concededly including the Delhi Sands Flower-Loving Fly] will therefore substantially affect land and objects that are involved in interstate commerce." Henderson Op. at 1059. I see this as no less of a stretch than Judge Wald's rationale. First, the Commerce Clause empowers Congress "to regulate commerce" not "ecosystems." The Framers of the Constitution extended that power to Congress, concededly without knowing the word "ecosystems," but certainly knowing as much about the dependence of humans on other species and each of them on the land as any ecologist today. An ecosystem is an ecosystem, and commerce is commerce.

Granted, years of jurisprudence have extended that regulatory authority to encompass "activities having a substantial effect on interstate commerce," the third category of *Lopez* legitimacy, but Judge Henderson's rationale fails the analysis of this third category as completely as does Judge Wald's. I will not rehash the first two subsidiary requirements, because the failure is for precisely the same reasons set forth above. As to the third subsidiary test, it fails for substantially the same reasons as Judge Wald's--it has no stopping point. There is no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of

the Delhi Sands Flower-Loving Fly will in fact "affect land and objects that are involved in interstate commerce," Henderson Op. at 1059, let alone do so substantially.[4] Nothing in the statute certainly necessitates such a nexus, nor has my colleague supplied a reason why this basis of regulation would apply to the preservation of a species any more than any other act potentially affecting the continued and stable existence of any other item of a purely intrastate nature upon which one might rest a speculation that its loss or change could somehow affect some other object, land, or otherwise, that might be involved in interstate commerce.

In addition to their biodiversity/ecosystem justifications, each of my colleagues offers a second rationale for justifying Interior's actions under the third category of *Lopez* regulation. Judge Wald asserts that "[t]he taking of the Fly and other endangered animals can also be regulated by Congress as an activity that substantially affects interstate commerce because it is the product of destructive interstate competition." Wald Op. at 1054. I am not at all certain what that means in relation to the application of the ESA to the building of a hospital and supporting infrastructure in a single intrastate location. She relies on *Hodel v. Virginia*, 452 U.S. 264, 101 S.Ct. 2352, 69 L.Ed.2d 1 (1981), *Hodel v. Indiana*, 452 U.S. 314, 101 S.Ct. 2376, 69 L.Ed.2d 40 (1981), and *United States v. Darby*, 312 U.S. 100, 61 S.Ct. 451, 85 L.Ed. 609 (1940). Although she asserts "striking parallels" between those cases and the present one, I see no parallel at all. In each of

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[4] Indeed, there is nothing in either Judge Henderson's opinion or the record to support speculation that the extinction of the Delhi Sands Flower-Loving Fly would have any effect on any other species.

those cases, Congress regulated arguably intrastate commercial activities, specifically mining and lumber production for interstate commerce. In each of those cases, the Supreme Court upheld the relevant statutes, noting that the regulated actors would either destroy other commercial activities or be able to unfairly compete with interstate competitors subject to higher regulatory standards protective of other elements of commerce. In the present case neither Congress nor the litigants, nor for that matter Judge Wald, has pointed to any commercial activity being regulated, any commercial competition being unfairly challenged, or any other sort of commerce being destroyed by the taking of the fly. With reference to her other rationale, I saw no stopping point; here, I am not even sure what the beginning point is, let alone the terminus. I do not think a decision upholding the challenged section of the ESA on this rationale can exist in the same jurisprudence as *Lopez*.

Finally, Judge Henderson would justify the challenged section on the basis that "in enacting the ESA, the Congress expressed an intent to protect not only endangered species, but also the habitats that they, and we, occupy." Henderson Op. at 1059. I see no legally significant distinction between this justification and her "ecosystems" justification. The Commerce Clause empowers Congress to regulate "commerce," not habitat. People and animals lived in habitats at the time of the adoption of the Constitution, and we live in habitats now. Because the power to regulate habitats was "not delegated to the United States by the Constitution, nor prohibited by it to the states," that power is "reserved to the states respectively, or to the people." U.S. CONST. Amend. X. For the reasons outlined with reference to the ecosystem justification, the habitat

justification fails as well.

Judge Henderson would support her view that Commerce Clause authority extends to the regulation of "land inhabited by the endangered species," with the language of *Wickard v. Filburn*, 317 U.S. 111, 125, 63 S.Ct. 82, 89, 87 L.Ed. 122 (1942), that a subject matter "may ... be reached by Congress" because "it asserts a substantial economic effect on interstate commerce." I do not see the applicability of the *Wickard* language to our present controversy. The statute in *Wickard* involved the regulation of the interstate wheat market. The issue in *Wickard* involved the production and consumption of homegrown wheat. Where Congress has acted to regulate interstate commerce in a commodity, the intrastate production and consumption of that commodity in fact has an obvious effect on the impact of the regulatory scheme. While the effect of one farmer's production and consumption may not by itself be substantial, "his contribution, taken together with that of many other similarly situated, is far from trivial." *Wickard* 317 U.S. at 127-28, 63 S.Ct. at 90, *quoted in Lopez* 514 U.S. at 556, 115 S.Ct. at 1628. In discussing *Wickard*, the *Lopez* Court rejected the notion that the *Wickard* precedent establishes that "all activities affecting commerce, even in the minutest degree, may be regulated and controlled by Congress." *Lopez* 514 U.S. at 558, 115 S.Ct. at 1629 (citation and internal punctuation omitted). It went on to note that the Court in *Maryland v. Wirtz*, 392 U.S. 183, 88 S.Ct. 2017, 20 L.Ed.2d 1020 (1968), had rejected that expansive reading of *Wickard* and held that "neither here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Id.* at 196 n. 27, 88 S.Ct. at 2024 n. 27, *quoted in Lopez* 514 U.S.

at 558, 115 S.Ct. at 1629. Here, there is no general regulatory scheme of interstate commerce in a commodity such that the cumulative effect of purely local state and private activities could substantially affect it. There is no commerce in the Delhi Sands Flower-Loving Fly.

An alternate reading of Judge Henderson's second justification with its stress on the effect of the regulation upon the highway and hospital is that she concludes that Congress may regulate purely intrastate activities -- *e.g.*, the habitat modification of the fly--where the regulation will then affect items which are arguably in interstate commerce. Again, I do not see the stopping point. Congress is not empowered either by the words of the Commerce Clause or by its interpretation in *Lopez* to regulate any non-commercial activity where the regulation will substantially affect interstate commerce. The most expansive view of *Lopez* is that Congress can regulate "those activities having a substantial relation to interstate commerce." Nowhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect.

In the end, attempts to regulate the killing of a fly under the Commerce Clause fail because there is certainly no interstate commerce in the Delhi Sands Flower-Loving Fly. The whole effort to employ a clause that empowers Congress to regulate commerce in order to serve a perhaps worthy but wholly non-commercial goal of preserving an endangered fly calls to mind the thoughts of the first great commentator on the Constitution, Justice Joseph Story. Story considered the then-current question of whether the constitutional authority to regulate commerce could be

applied to the perhaps worthy "purpose of encouraging and protecting domestic manufactures." He declared,

> "If this were admitted, the enumeration of the powers of congress would be wholly unnecessary and nugatory. Agriculture, colonies, capital, machinery, the wages of labour, the profits of stock, the rents of land, the punctual performance of contracts, and the diffusion of knowledge would all be within the scope of the power; for all of them bear an intimate relation to commerce. The result would be, that the powers of congress would embrace the widest extent of legislative functions, to the utter demolition of all constitutional boundaries between the state and national governments.... The power to regulate manufactures is no more confided to congress, than the power to interfere with the systems of education, the poor laws, or the road laws of the states.

Joseph Story, 2 *Commentaries on the Constitution* § 1075 (1833).

CONCLUSION

I dissent from the decision of this court to uphold that regulation.

Supreme Court, U.S.
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No. 97-1451

In the Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Congress has power under the Commerce Clause of the Constitution to prevent the extinction of species by prohibiting the "taking" of species listed as endangered, including species that live entirely within the boundary of a single State.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	10
Conclusion	19

TABLE OF AUTHORITIES

Cases:

Andrus v. *Allard*, 444 U.S. 51 (1979)	10
Babbitt v. *Sweet Home Chapter of Communities*, 515 U.S. 687 (1995)	3, 11
Black v. *Cutter Laboratories*, 351 U.S. 292 (1956)	13
California v. *Rooney*, 483 U.S. 307 (1987)	13
Douglas v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977)	10
Fry v. *United States*, 421 U.S. 542 (1975)	7
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	18
Hoffman Homes, Inc. v. *Administrator, EPA*, 999 F.2d 256 (7th Cir. 1993)	15
Leslie Salt Co. v. *United States*, 55 F.3d 1388 (9th Cir.), cert. denied, 516 U.S. 955 (1995)	15
Lucas v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992)	12
Maryland v. *Wirtz*, 392 U.S. 183 (1968)	16
Missouri v. *Holland*, 252 U.S. 416 (1920)	10, 11
North Dakota v. *United States*, 460 U.S. 300 (1983)	10
Palila v. *Hawaii Dep't of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981)	12, 17
Perez v. *United States*, 402 U.S. 146 (1971)	15

Cases—Continued: Page

TVA v. *Hill*, 437 U.S. 153 (1978) 11
United States v. *Bramble*, 103 F.3d 1475 (9th Cir. 1997) 12, 13, 17
United States v. *Darby*, 312 U.S. 100 (1941) 18
United States v. *Lopez*, 514 U.S. 549 (1995) .. 9, 11, 16, 18
United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) 14
United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) 14

Constitution, statutes and regulations:

U.S. Const.:
Art. I, § 8, Cl. 3 (Commerce Clause) .. 7, 10, 11, 15, 16, 17
Amend. V 12
Amend. X 10
Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.* 12, 17
Clean Water Act, 33 U.S.C. 1251 *et seq.* 14
Endangered Species Act of 1973, 16 U.S.C. 1531 *et seq.* 2
§ 3(6), 16 U.S.C. 1532(6) 2
§ 3(15), 16 U.S.C. 1532(15) 2
§ 3(19), 16 U.S.C. 1532(19) 3
§ 4(a)(1)(A), 16 U.S.C. 1533(a)(1)(A) 2
§ 4(a)(1)(B), 16 U.S.C. 1533(a)(1)(B) 2-3
§ 4(b)(1)(A), 16 U.S.C. 1533(b)(1)(A) 2, 5
§ 4(f), 16 U.S.C. 1533(f) 17
§ 9, 16 U.S.C. 1538 12
§ 9(a)(1), 16 U.S.C. 1538(a)(1) 3
§ 9(a)(1)(B), 16 U.S.C. 1538(a)(1)(B) 2-3, 6, 12, 16
§ 9(a)(1)(D)-(F), 16 U.S.C. 1538(a)(1)(D)-(F) 17
§ 10(a), 16 U.S.C. 1539(a) 3
§ 10(a)(2)(A)(i)-(iv),16 U.S.C. 1539(a)(2)(A)(i)-(iv) 4
§ 11, 16 U.S.C. 1540 4
§ 11(a), 16 U.S.C. 1540(a) 4
§ 11(b), 16 U.S.C. 1540(b) 4
§ 11(e)(6), 16 U.S.C. 1540(e)(6) 4
§ 11(g)(1), 16 U.S.C. 1540(g)(1) 4

Statute and regulations—Continued: Page

18 U.S.C. 844(i) 14
50 C.F.R.:
Pt. 17:
Section 17.3 3
Section 17.21(c) 3
Section 17.31(a) 3
Pt. 402:
Section 402.01(b) 2

Miscellaneous:

55 Fed. Reg. 52,852 (1990) 4
57 Fed. Reg. 54,547 (1992) 4
58 Fed. Reg. (1993):
p. 49,881 4
p. 49,884 5
p. 49,885 ..... 4, 5
H.R. Rep. No. 412, 93d Cong., 1st Sess. (1973) 7, 11, 16
Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 Pub. Land & Res. L. Rev. 55 (1996) 17

In the Supreme Court of the United States

OCTOBER TERM, 1997

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 23a-91a) is reported at 130 F.3d 1041. The opinion of the district court (Pet. App. 1a-22a) is reported at 949 F. Supp. 1.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. The petition for a writ of certiorari was filed on March 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Endangered Species Act of 1973 (ESA or Act), 16 U.S.C. 1531 *et seq.*, mandates protection and conservation measures for species of fish or wildlife determined to be endangered or threatened. Administration of the ESA is divided between the Fish and Wildlife Service (FWS) in the Department of the Interior and the National Marine Fisheries Service in the Department of Commerce. See 16 U.S.C. 1532(15); 50 C.F.R. 402.01(b).

Under Section 4(a) of the Act, the relevant Secretary determines whether to list a species as "endangered" or "threatened," based on factors that include the "present or threatened destruction, modification, or curtailment of its habitat or range" and "overutilization for commercial, recreational, scientific, or educational purposes." 16 U.S.C. 1533(a)(1)(A) and (B). In determining whether listing of a species is warranted, the Secretary must take into account the efforts to protect the species undertaken by States or their political subdivisions. 16 U.S.C. 1533(b)(1)(A). The term "endangered species" includes "any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man." 16 U.S.C. 1532(6).

Once a species is determined to be endangered or threatened, several related protections apply. At issue in this case is Section 9(a)(1)(B) of the Act, which generally makes it unlawful to "take" any endangered species of fish or wildlife. 16 U.S.C.

1538(a)(1)(B).[1] The term "take" is defined to mean "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. 1532(19). The FWS has further defined the term "harm," as used in the definition of "take," to include:

> an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.

50 C.F.R. 17.3.[2]

The ESA does not impose an absolute prohibition on all takings of listed species. Pursuant to Section 10(a) of the Act, the Secretary may issue permits authorizing incidental takings that are not likely to jeopardize the continued existence of the listed species. 16 U.S.C. 1539(a). To secure a Section 10(a) permit, the applicant must submit a conservation plan that specifies (1) the impact that will likely result from the taking; (2) the steps the applicant is pursuing to minimize those impacts and the funding available to implement those steps; (3) the alternatives the applicant considered and the reasons they were rejected; and (4) any other measures the Secre-

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[1] By regulation, FWS has extended the proscriptions of Section 9(a)(1) to threatened species. 50 C.F.R. 17.31(a), 17.21(c).

[2] In *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 708 (1995), this Court concluded that "the Secretary reasonably construed the intent of Congress when he defined 'harm' to include 'significant habitat modification or degradation that actually kills or injures wildlife.' "

tary deems necessary or appropriate. 16 U.S.C. 1539(a)(2)(A)(i)-(iv).

Section 11 of the Act sets forth enforcement mechanisms and penalty provisions. The Attorney General is authorized to seek injunctive relief against persons alleged to be in violation of the ESA. 16 U.S.C. 1540(e)(6). The Secretary may assess civil monetary penalties, 16 U.S.C. 1540(a), and persons who commit knowing violations of the Act are subject to criminal sanctions, 16 U.S.C. 1540(b). The Act also contains a "citizen suit" provision that authorizes "any person" to sue to enjoin violations. 16 U.S.C. 1540(g)(1).

2. In October 1989 and July 1990, FWS received petitions proposing that the Delhi Sands Flower-Loving Fly (*Rhaphiomidas terminatus abdominalis*) be listed as endangered. In December 1990 FWS published a finding that substantial information had been presented to indicate that listing might be warranted. 55 Fed. Reg. 52,852. In November 1992, FWS published a proposed rule to list the Fly as endangered. 57 Fed. Reg. 54,547. On September 23, 1993, the agency issued a final determination that the Fly is an endangered species. 58 Fed. Reg. 49,881.

In its final rule, FWS found that the Fly is in "imminent danger of extinction due to extensive habitat loss and degradation that has reduced its range by 97 percent." 58 Fed. Reg. 49,881 (1993). FWS also found that commercial and scientific utilization imperiled the species, noting that "*Rhaphiomidas* flies are prized because of their unusual size, coloration, and rarity." *Id.* at 49,885.[3] There are currently only five

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[3] Prior to its listing as endangered, specimens of the Delhi Sands Fly were sold in interstate commerce to collectors. C.A. App. 447-456.

known populations of the Fly, all of which are located within an eight-mile radius in Riverside and San Bernardino Counties, California. *Id.* at 49,884. As required by the Act, see 16 U.S.C. 1533(b)(1)(A), FWS considered whether state and local regulation would be adequate to preserve the species. After noting that the California Department of Fish and Game "has determined that it is unable to protect insects under current State regulations," and that local planning efforts were not adequately providing for conservation of the Fly, FWS concluded that "existing regulatory mechanisms are inadequate to protect this species and its habitats." 58 Fed. Reg. 49,885 (1993).

3. In July 1992, the San Bernardino County Board of Supervisors authorized acquisition of a site for a new county hospital. C.A. App. 163. The 76-acre site contains habitat of the Delhi Sands Flower-Loving Fly. *Id.* at 347. When the Fly was proposed for listing, FWS notified a County authority of the potential listing of the species, and discussions ensued regarding steps that could eliminate the need for individual Section 10 permits. *Id.* at 409. In May 1993, prior to the final decision to list the Fly as an endangered species, FWS advised the County that the hospital site was occupied by the Fly and that construction of the facility as proposed would likely take members of the species. *Id.* at 410. The County elected to modify the layout of the hospital to eliminate impacts to the Fly and the need for a Section 10 permit. *Id.* at 347, 668. The County developed a Habitat Preservation Plan, under which the location of the planned hospital would be moved 250 feet north, and 8.35 acres would be set aside for a protected Fly habitat. *Id.* at 352, 410-411, 675, 678. The plan also

created a 100-foot wide corridor linking two Fly habitat areas. Pet. App. 29a.

In October 1994, the City of Colton approached FWS with a proposal to build an electrical substation to serve the hospital. C.A. App. 412. The substation was to be located on the protected Fly habitat at the hospital site. *Ibid.* The City proposed to destroy about 4 acres of Fly habitat and to acquire a 7.5-acre site as Fly habitat to offset that loss. *Id.* at 413. In connection with that proposal, the City submitted an application to FWS for incidental take of the Fly. *Ibid.* In November 1995, FWS issued the Section 10(a) permit, and construction of the substation began shortly thereafter. *Ibid.*; see Pet. App. 29a-30a.

4. The petitioners in this case are the County, the City of Colton and the City of Fontana, and two building industry organizations. On October 20, 1995, petitioners filed suit against the Secretary of the Interior and the Director of FWS. Petitioners sought a declaration that Section 9(a)(1)(B) and implementing regulations are unconstitutional as applied to protect the habitat of an intra-state species on non-federal land. Pet. App. 30a; C.A. App. 491-518.[4]

The district court granted the government's motion for summary judgment. Pet. App. 1a-22a. Enactment of the ESA, the court observed, reflected congressional concern about the accelerating pace of

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[4] In November 1995, the County informed FWS that it intended to redesign an intersection near the hospital in order to facilitate access by emergency vehicles. Pet. App. 30a. That alteration would have reduced from 100 to 18 feet the width of the corridor between Fly habitations described in the Habitat Preservation Plan. *Ibid.* FWS informed the County that redesign of the intersection would probably effect a prohibited taking of the Fly. *Ibid.*

extinctions and the inadequacy of state efforts to prevent the loss of a "genetic heritage" of "incalculable" value. *Id.* at 12a (quoting H.R. Rep. No. 412, 93d Cong., 1st Sess. 4 (1973) (House Report)). The court concluded that "[t]he application of 16 U.S.C. § 1538(a)(1)(B) to the Fly is a valid exercise of Congress' power under the Commerce Clause." Pet. App. 16a. It explained that wildlife generally, and the Fly in particular, have frequently been transported in interstate commerce. *Id.* at 17a-18a.[5] The court noted that even purely intrastate activity is subject to congressional regulation under the Commerce Clause "where the activity, combined with like conduct by others similarly situated, affects commerce among the States." *Id.* at 19a (quoting *Fry* v. *United States*, 421 U.S. 542, 547 (1975)). It concluded that "[t]he 'taking' of individual species located entirely within one state, would clearly, in the aggregate, have a significant effect upon interstate commerce." Pet. App. 19a.

5. The court of appeals affirmed. Pet. App. 23a-91a. Judge Wald and Judge Henderson, while agreeing that the ESA is constitutional as applied to the present

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[5] With respect to the Fly in particular, the court explained that

> the government has offered uncontroverted evidence that the Fly is, and would likely continue to be, an article in interstate commerce. The Fly is currently on exhibit in at least three museums located outside of the state of California. In addition, the Fly has been the subject of interstate trade among insect collectors. Lastly, interested persons have traveled from outside the state of California to observe and study the Fly.

Pet. App. 18a (footnote omitted).

case, issued separate opinions. Judge Sentelle dissented.

A. Judge Wald first determined that application of the ESA's "take" prohibition to the Fly is a constitutional exercise of Congress's authority to regulate the channels of interstate commerce. Pet. App. 34a-41a. She stated that "[t]he ESA's prohibition on takings of endangered species can be justified as a necessary aid to the prohibitions in the ESA on transporting and selling endangered species in interstate commerce." *Id.* at 35a. She concluded as well that "[t]he prohibition on takings of endangered animals also falls under Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes." *Id.* at 38a.

Judge Wald also determined that application of the "take" prohibition constitutes permissible regulation of activities having a substantial effect on interstate commerce. Pet. App. 41a-65a. She explained that "the committee reports on the ESA discuss the value of preserving genetic diversity and the potential for future commerce related to that diversity." *Id.* at 48a. She noted that "endangered plants and animals are valuable as sources of medicine and genes," *id.* at 51a; that "the genetic material of wild species of plants and animals is inbred into domestic crops and animals to improve their commercial value and productivity," *id.* at 52a; and that the extinction of existing species "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes," *id.* at 53a.[6] Judge Wald further concluded that "[t]he

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[6] Judge Wald explained that "because we know that in the aggregate the extinction of endangered species will have a

taking of the Fly and other endangered animals can also be regulated by Congress as an activity that substantially affects interstate commerce because it is the product of destructive interstate competition," *id.* at 58a, since individual States may be "motivated to adopt lower standards of endangered species protection in order to attract development," *id.* at 60a. She noted in that regard that "the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population." *Id.* at 63a.

B. Judge Henderson filed a concurring opinion. Pet. App. 66a-72a. She explained that, "[g]iven the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce." *Id.* at 70a. Judge Henderson found it "particularly obvious" (*ibid.*) that application of the ESA would be constitutional in the instant case, since "both the proposed redesigned traffic intersection and the hospital it is intended to serve" would have "an obvious connection with interstate commerce." *Id.* at 71a.

C. Judge Sentelle dissented. Pet. App. 72a-91a. Relying principally on this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), Judge

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substantial effect on interstate commerce, it does not matter that it is impossible to calculate the exact impact of the extinction of a single species such as the Fly." Pet. App. 55a n.14 (internal quotation marks omitted).

Sentelle concluded that application of the ESA to the instant case lay beyond Congress's authority under the Commerce Clause. He asserted that "[t]he fly is not an article of interstate commerce, and does not travel the channels of interstate commerce." Pet. App. 80a n.1. Judge Sentelle also rejected the contention that the ESA's "take" prohibition should be upheld as a regulation of activities substantially affecting interstate commerce. In his view, "[t]here [wa]s no showing, but only the rankest of speculation, that a reduction or even complete destruction of the viability of the Delhi Sands Flower-Loving Fly will in fact affect land and objects that are involved in interstate commerce, let alone do so substantially." *Id.* at 86a-87a (internal quotation marks omitted).

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. This Court has long recognized that protection of fish and wildlife is a legitimate subject of congressional regulation. See *Missouri* v. *Holland*, 252 U.S. 416 (1920) (sustaining the Migratory Bird Treaty Act against challenges that it exceeded Congress's treaty-making powers and infringed on powers reserved to the States under Tenth Amendment); *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265 (1977) (Congress had power under the Commerce Clause to regulate the taking of fish from state waters, thus preempting conflicting state laws); *Andrus* v. *Allard*, 444 U.S. 51, 63 n.19 (1979) (the "assumption that the national commerce power does not reach migratory wildlife is clearly flawed"); *North Dakota* v. *United*

States, 460 U.S. 300, 309 (1983) ("The protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'") (quoting *Holland*, 262 U.S. at 435).

This Court has not squarely addressed the question whether enactment of the ESA, or its application to particular factual settings, is a valid exercise of congressional authority under the Commerce Clause. In resolving questions concerning the proper construction of the Act, however, the Court has recognized Congress's concern "about the *unknown* uses that endangered species might have and about the *unforeseeable* place such creatures may have in the chain of life on this planet." *TVA* v. *Hill*, 437 U.S. 153, 178-179 (1978). The Court in *TVA* relied on the Act's legislative history, which emphasized the "incalculable" value of endangered species as "potential resources" and "keys to puzzles which we cannot solve." *Id.* at 178 (quoting House Report at 4-5). In *Babbitt* v. *Sweet Home Chapter of Communities*, 515 U.S. 687, 699 (1995), the Court held that "Congress' intent to provide comprehensive protection for endangered and threatened species supports the permissibility of the Secretary's 'harm' regulation." While not dispositive of the constitutional question, the Court's decisions interpreting and applying the ESA provide no support for petitioners' contention that the Act's "take" prohibition exceeds Congress's powers under the Commerce Clause.

2. Petitioners argue (Pet. 5-15) that the proper interpretation of this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), is the subject of general confusion and uncertainty in the lower federal courts. For two reasons, that contention

provides no ground for this Court to review the decision of the court of appeals.[7]

A. Petitioners do not contend that the courts of appeals are divided with respect to the constitutionality of the ESA generally, or of the "take" prohibition in particular. Indeed, petitioners cite no decision holding any application of the ESA to be unconstitutional.[8] Absent any disagreement among the lower

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[7] Contrary to the suggestion of amicus Defenders of Property Rights (see Br. 16-18), this case does not present a suitable vehicle for determining when FWS's administration of ESA Section 9(a)(1)(B) might effect a taking of private property requiring payment of just compensation under the Fifth Amendment. First, the issue is not fairly included within the question presented in the petition for a writ of certiorari. Second, petitioners did not assert a Fifth Amendment claim in the courts below, and nothing in the record suggests that petitioners have been "denie[d] all economically beneficial or productive use of land." *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1015 (1992).

[8] In *Palila* v. *Hawaii Department of Land & Natural Resources*, 471 F. Supp. 985 (D. Haw. 1979), aff'd, 639 F.2d 495 (9th Cir. 1981), the district court upheld Section 9 of the ESA against a similar challenge that it exceeded congressional power. The court explained that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species and of interstate movement of persons, such as amateur students of nature or professional scientists who come to a state to observe and study these species, that would otherwise be lost by state inaction." 471 F. Supp. at 995. It concluded that "[t]he Endangered Species Act is a valid exercise of Congressional power pursuant to the treaty-making power and the Commerce Clause of the Constitution." *Id.* at 999. In *United States* v. *Bramble*, 103 F.3d 1475, 1480-1481 (9th Cir. 1997), the court of appeals expressly reaffirmed the rationale of *Palila* in the course of upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.* The court observed that "[e]xtinction of the

courts regarding the constitutionality of the ESA, the instant case would not warrant this Court's review even if petitioners could demonstrate the existence of a circuit conflict, or substantial confusion in the courts of appeals, with respect to the status under *Lopez* of *other* federal statutes.

B. In any event, petitioners have not identified a circuit conflict with respect to the constitutionality, under *Lopez*, of *any* federal statute or application thereof.[9] Although petitioners identify several cases (see Pet. 7-13) in which members of appellate panels have disagreed as to the proper application of *Lopez*, the existence of non-unanimous court of appeals decisions is neither unusual nor a proper basis for invoking this Court's review. The fact (see Pet. 13-15) that the courts of appeals have sometimes disagreed with (and therefore reversed) district court decisions in cases presenting *Lopez*-related issues is

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eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity: future commerce in eagles or their parts; future interstate travel for the purpose of observing or studying eagles; or future commerce in beneficial products derived either from eagles or from analysis of their genetic material." 103 F.3d at 1481. Petitioners cite no contrary authority, and we are aware of none.

[9] Although petitioners contend (Pet. 6) that "the circuits cannot agree on the meaning of *Lopez*," they assert only that various courts of appeals have employed different modes of analysis in resolving *Lopez*-based challenges to different statutory and regulatory provisions. Because "[t]his Court 'reviews judgments, not statements in opinions,' " *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (quoting *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956)), that assertion provides an inadequate basis for seeking this Court's review.

an even more insubstantial justification for seeking review by this Court.

Petitioners cite only two court of appeals decisions—*United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997), and *United States* v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995)—that have invalidated federal government actions on the basis of this Court's decision in *Lopez*. Those cases do not support petitioners' constitutional claim. In *Wilson*, a defendant convicted of criminal violations of the Clean Water Act, 33 U.S.C. 1251 *et seq.*, contended that jury instructions defining the statutory term "waters of the United States"—instructions that closely tracked the language of an Army Corps of Engineers regulation, which defined the term to include isolated waters whose degradation or destruction "could affect" interstate or foreign commerce—had given the term an unduly broad scope. 133 F.3d at 256. The Fourth Circuit stated that such a definition, if embodied in the Act itself, would create serious constitutional difficulties. It concluded, however, that it need not resolve the constitutional question, holding instead that the Corps had exceeded its statutory authority in promulgating the rule. *Id.* at 256-257. In *Pappadopoulos*, the Ninth Circuit held that a particular act of arson had not been shown to have the effect on interstate commerce required by 18 U.S.C. 844(i). 64 F.3d at 527. Quite apart from the fact that neither of those decisions involved the ESA or protection of wildlife generally, neither decision invalidated an Act of Congress or any provision thereof.[10]

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[10] Amicus Pacific Legal Foundation is also wrong in contending (Br. 12-14) that the decision below conflicts with the

3. The decision of the court of appeals is correct. Petitioners do not contest the proposition that takings of endangered species will, in the aggregate, have a substantial effect on interstate commerce. They argue instead that application of the ESA's "take" prohibition to the Delhi Sands Flower-Loving Fly exceeds Congress's authority under the Commerce Clause because the Fly "lack[s] any economic significance whatsoever." Pet. 4. That argument is flawed in two respects.

A. This Court has squarely held that "[w]here the *class of activities* is regulated and that *class* is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Perez* v. *United States*, 402 U.S. 146, 154 (1971) (internal quotation marks omitted). The Court specifically reaffirmed that principle in *Lopez*, quoting with approval its prior statement that "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of

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rulings of the Seventh and Ninth Circuits in *Hoffman Homes, Inc.* v. *Administrator, EPA*, 999 F.2d 256 (7th Cir. 1993), and *Leslie Salt Co.* v. *United States*, 55 F.3d 1388 (9th Cir.), cert. denied, 516 U.S. 955 (1995). Neither case involved the ESA, and neither case involved a successful Commerce Clause challenge to an Act of Congress or other federal action. Although the Seventh Circuit in *Hoffman Homes* held that the Environmental Protection Agency had misapplied its own regulation, it did not cast doubt on the regulation itself, which provides that use by migratory birds is a sufficient basis for federal regulation of wetlands under the Clean Water Act. See 999 F.2d at 261-262. The Ninth Circuit in *Leslie Salt* relied on law of the case principles in upholding a similar Army Corps of Engineers regulation against statutory and constitutional challenge. See 55 F.3d at 1394-1396.

no consequence." *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968) (quoted in *Lopez*, 514 U.S. at 558). Section 9(a)(1)(B) of the ESA regulates takings of all species that have met the strict criteria for listing by the Secretaries as endangered or threatened. 16 U.S.C. 1538(a)(1)(B). Disaggregation of that class into component species, or particular members of a species, is inconsistent with this Court's precedents. See Pet. App. 55a n.14 ("because we know that in the aggregate the extinction of endangered species will have a substantial effect on interstate commerce, it does not matter that it is impossible to calculate the exact impact of the extinction of a single species such as the Fly") (Wald, J.) (internal quotation marks omitted). Such an approach is also contrary to Congress's view that species are part of an interdependent web, the value of which transcends the value of the individual species that make it up. See House Report at 4-5.

B. Even if it were appropriate to focus the Commerce Clause inquiry on the specific conduct at issue in this case, petitioners' constitutional challenge would fail. As the district court observed, "the government has offered uncontroverted evidence that the Fly is, and would likely continue to be, an article in interstate commerce." Pet. App. 18a; see nn. 3, 5, *supra*. The court explained that the Fly "is currently on exhibit in at least three museums located outside of the state of California" and "has been the subject of interstate trade among insect collectors." *Ibid.* Congress could reasonably seek to preserve

the possibility of future commerce in the Fly by protecting the remaining members of the species.[11]

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[11] The goal of the ESA is not simply to keep endangered species on the razor's edge between survival and extinction, but to assist in recovering the species to the point that it no longer requires extraordinary protection. See, *e.g.*, 16 U.S.C. 1533(f) (recovery plans); see generally Jason M. Patlis, *Recovery, Conservation, and Survival Under the Endangered Species Act: Recovering Species, Conserving Resources, and Saving the Law*, 17 Pub. Land & Res. L. Rev. 55, 56 (1996) (ESA "seeks not only to arrest the decline of those species on the brink of extinction, but to bring about their recovery so that they can assume their natural role in the ecosystem").

The statement of the dissenting judge below that "[t]he fly is not an article of interstate commerce, and does not travel the channels of commerce," Pet. App. 80a n.1, appears simply to reflect the fact that commercial traffic in the Fly is *currently* prohibited as a result of its listing as an endangered species. See 16 U.S.C. 1538(a)(1)(D)-(F). But while the ESA proscribes interstate commerce in an endangered species for so long as the species remains listed, the Act's protective measures may nevertheless serve, in the long term, to facilitate future commerce in the species after recovery efforts are complete. See *Palila*, 471 F. Supp. at 995 (explaining that "a national program to protect and improve the natural habitats of endangered species preserves the possibilities of interstate commerce in these species"); cf. *Bramble*, 103 F.3d at 1481 (upholding the Bald Eagle Protection Act, 16 U.S.C. 668 *et seq.*, as a valid exercise of Commerce Clause authority, and observing that "[e]xtinction of the eagle would substantially affect interstate commerce by foreclosing any possibility of several types of commercial activity," including "future commerce in eagles or their parts"). If the protection of endangered species bears a constitutionally sufficient nexus to interstate commerce, Congress's decision to impose a ban on commercial activity pending restoration of the species cannot destroy that nexus or render the ESA's other protective measures unconstitutional. See Pet. App. 18a n.17.

As both members of the court of appeals majority observed, moreover, Congress's authority to prohibit takings of an endangered species is especially clear where (as here) the taking is accomplished by commercial activity having an obvious interstate nexus. See Pet. App. 63a (Wald, J.) (noting that "the statute in this case regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population"); *id.* at 70a-71a (Henderson, J., concurring) (finding it "particularly obvious" that application of the ESA would be constitutional in the instant case, since "both the proposed redesigned traffic intersection and the hospital it is intended to serve" would have "an obvious connection with interstate commerce"). Congress has well-established power "to keep the channels of interstate commerce free from immoral and injurious uses," *Lopez*, 514 U.S. at 558 (quoting *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 256 (1964)), even where the injury to be averted is noncommercial in nature. See, *e.g.*, *United States* v. *Darby*, 312 U.S. 100, 114-116 (1941). The ESA's "take" prohibition would therefore be constitutional as applied to commercial activities such as the construction project at issue in this case, even if its application to wholly non-commercial conduct lay beyond Congress's authority.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the

Supreme Court of the United States

October Term, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, ET AL.,
Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a species' potential impact on "biodiversity," and the possibility that commerce may be affected by "biodiversity," constitute a sufficiently substantial effect upon interstate commerce such that the federal government may regulate all activities affecting that species under its Commerce Clause powers?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES CITED iv

INTEREST OF AMICUS CURIAE 1

INTRODUCTION 1

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT 5

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER POTENTIAL OR SPECULATIVE EFFECTS ON COMMERCE ARE SUFFICIENT TO SUSTAIN FEDERAL REGULATORY AUTHORITY AFFECTING LOCAL LAND USE DECISIONS 5

A. The Decision of the Court Below, Finding That Congress Can Regulate Under the Commerce Clause Based upon Theoretical, Speculative, or Potential Effects Upon Interstate Commerce, Conflicts With the Fourth Circuit's Decision in *United States v. Wilson* 9

B. The Seventh and Ninth Circuits Have Held That Federal Agencies Must Demonstrate an Actual and Specific Connection to Commerce in Order for Federal Agencies to Exercise Jurisdiction Under the Commerce Clause 12

CONCLUSION 15

TABLE OF AUTHORITIES CITED

Page

Cases

Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon, 115 S. Ct. 2407 (1995) 1

Bennett v. Spear, 117 S. Ct. 1154 (1997) 1

Cargill, Inc. v. United States, 116 S. Ct. 407 (1995) 14

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 1

Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency, 999 F.2d 256 (7th Cir. 1993) 12-14

Leslie Salt Co. v. United States, 55 F.3d 1388 (9th Cir. 1995), *cert. denied, Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995) 12-14

National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 3-4, 6-9

United States v. Lopez, 514 U.S. 549, 115 S. Ct 1624 (1995) 1-2, 5, 7, 15

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 10

United States v. Wilson, 133 F.3d 251 (4th Cir. 1997). 9-11

United States Constitution

Article I, Section 8, Clause 3 1

Statutes

33 C.F.R. § 328.3(a)(3) (1993) 10

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF)[1] is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating in the public interest. Over 25,000 individuals, organizations, associations, and corporations support PLF's efforts nationwide.

PLF has participated in numerous cases concerning the interpretation of the Commerce Clause, as well as cases relating to the Endangered Species Act. For example, PLF participated as amicus curiae before this Court in *Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981); *United States v. Lopez*, 514 U.S. 549, 115 S. Ct. 1624 (1995); *Babbitt v. Sweet Home Chapter of Communities for a Greater Oregon*, 115 S. Ct. 2407 (1995); and *Bennett v. Spear*, 117 S. Ct. 1154 (1997).

Amicus seeks to augment the arguments of Petitioners that this Court's additional guidance is critical to understanding and applying the limitations imposed by the Commerce Clause as a grant of authority to the federal government.

INTRODUCTION

Article I, Section 8, Clause 3, of the United States Constitution is a grant from the people of this country to Congress of the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." In the years since our Constitution was drafted, the increased ability to communicate among, travel to, and trade with people in all parts of our nation and the world has been accompanied by a corresponding increase in the number of

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[1] Pursuant to Supreme Court Rule 37.6, amicus curiae Pacific Legal Foundation affirms that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

activities that the federal government has sought to regulate under its commerce power, so that federal power touches many aspects of our lives. Unfortunately, this expansion of federal power has encouraged many in our federal government, particularly executive agencies, to operate on the presumption that federal power is without any limitations at all.

One such agency is the United States Fish and Wildlife Service. Under the Endangered Species Act of 1973, Fish and Wildlife is engaging in widespread federal land use regulation of private property to protect species listed as endangered or threatened. Although Congress enacted the Endangered Species Act pursuant to its Commerce Clause powers, neither the Act nor Fish and Wildlife's own regulations or practices require that there be any connection between the activity being regulated under the Endangered Species Act and interstate commerce.

This case is a challenge to Fish and Wildlife's assertion of broad regulatory authority. To validate its actions, the court below supplied the justification that, because wildlife contributes to the biodiversity of the earth's ecosystems, upon which all things, including commerce, depend, the federal government can regulate *all species*, because all species impact the earth's biodiversity. This finding that Congress can regulate based upon theoretical, speculative, or potential impacts upon commerce directly contravenes the jurisprudence of other circuits and this Court's decision in *United States v. Lopez*.

Petitioners ask this Court to resolve whether the decision of the court below comports with our constitutional framework. Under the rationale supported by the court below, the federal government is able to regulate a swimming pool because *all* water affects interstate commerce, and regulate a flower bed because the aggregate impact of all flower beds *may some day* have a substantial effect on interstate commerce. And while the federal government does not directly regulate swimming pools and flower beds, the facts of this case demonstrate that the Fish

and Wildlife Service is purporting to use the Endangered Species Act to regulate such things to the minutest degree.

STATEMENT OF THE CASE

In 1993, the Secretary of Interior listed the Delhi Sands Flower-Loving Fly as an endangered species under the Endangered Species Act, 16 U.S.C. § 1531, *et seq*. *National Association of Home Builders v. Babbitt*, 130 F.3d 1041, 1060 (D.C. Cir. 1997) (*NAHB*) (Sentelle, J., dissenting). This fly exists only within the State of California. *Id.* Indeed, the United States Fish and Wildlife Service admits that the fly exists only in 40 square miles of Southern California--on small patches of land covered with a fine sand known as "Delhi sand." *Id.* at 1043, 1060.

According to the Fish and Wildlife Service, the fly spends the majority of its two-year life span--over 1 year and 10 months--in the pupal stage, underneath the Delhi sand. *Id.* at 1060. It emerges in its adult stage during the late summer months to breed and feed. *Id.* The fly exists only in small "colonies." In fact, this litigation commenced over Fish and Wildlife's protection of a single colony of eight flies. *Id.*

Federal protection of the fly has disrupted the operations of two cities and the County of San Bernardino (County), as well as the development plans of numerous private property owners. In particular, the Fish and Wildlife Service listed the fly one day before construction on San Bernardino's county hospital was slated to begin. *Id.* As a result, the Service compelled the County to relocate the hospital 250 feet north of its original building site, claiming that proceeding as planned would result in the unlawful "take" of an endangered species. *Id.* This relocation caused a one year delay in the hospital's construction and cost the County's taxpaying citizens an additional $3.5 million in building costs. *Id.*

For additional mitigation, Fish and Wildlife also demanded that the County set aside over eight acres of land from the

original hospital site as fly habitat. *Id.* Attached to this dedicated plot, Fish and Wildlife had the County create a 100-foot wide "fly corridor." *Id.* at 1044. In theory, the flies will choose this route to migrate to other suitable habitat during their short lives above ground. *Id.* at 1044-45. Because of Fish and Wildlife's insistence on preserving this artificial corridor without modification, the County's efforts to redesign a highway intersection to accommodate hospital traffic have been stymied. *Id.* at 1045.

Delay and redesign of the hospital and its related intersection are but a few of the impacts that have resulted from Fish and Wildlife's implementation of the Endangered Species Act. A Fish and Wildlife representative originally demanded that nearby Interstate 10 close down during the flies' "active" period in August and September. *Id.* at 1060. But, this demand was eventually withdrawn. *Id.*

The court below upheld Fish and Wildlife's regulation of this local species under the Endangered Species Act as a legitimate exercise of the authority to regulate interstate commerce. However, the court did not require that Fish and Wildlife make an individualized determination that the species substantially affects interstate commerce. Rather, it is enough, the court held, that a species contribute to general biodiversity, since biodiversity itself substantially affects interstate commerce.

SUMMARY OF ARGUMENT

The Petitioners have filed their petition asking this Court to review whether the need for species "biodiversity" provides a sufficiently substantial effect upon interstate commerce such that the federal government may regulate matters affecting species under its commerce power. Although the court below answered this question in the affirmative, the majority of the three-member panel could not agree on why this was so. However, both judges who sustained the jurisdiction of

the United States Fish and Wildlife Service did so on the basis that theoretical, potential, and speculative effects upon commerce were sufficient to confer federal jurisdiction under the Commerce Clause.

This finding that federal agencies may regulate based upon potential or speculative, rather than actual and specific, effects upon commerce, directly conflicts with the decisions of this Court and of other circuits. Specifically, the Fourth Circuit, in applying this Court's decision in *United States v. Lopez*, 115 S. Ct. 1624, held that a federal agency could not invoke jurisdiction where no commerce nexus was directly established. Furthermore, the decision of the court below conflicts with pre-*Lopez* decisions of the Seventh and Ninth Circuits, which required the federal government to demonstrate an actual and specific connection with interstate commerce before a federal agency could assert jurisdiction over local land use activities. To resolve these conflicts, and to give the lower courts guidance in understanding the limitation of the federal constitutional commerce power, this Court should grant the Petition for Writ of Certiorari.

ARGUMENT

THIS COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS AS TO WHETHER POTENTIAL OR SPECULATIVE EFFECTS ON COMMERCE ARE SUFFICIENT TO SUSTAIN FEDERAL REGULATORY AUTHORITY AFFECTING LOCAL LAND USE DECISIONS

The court below upheld Fish and Wildlife's exercise of authority to regulate activities affecting the endangered Delhi Sands Flower-Loving Fly. Specifically, the court held that all of the actions taken by Fish and Wildlife to protect the fly, including regulation of local land use activities, were valid

exercises of federal authority under the Commerce Clause. However, the two-member majority of the panel could not agree on a rationale. Judge Wald found that regulation of the fly could be sustained because it regulated the use of the channels of interstate commerce and regulated an activity that substantially affects interstate commerce. *NAHB*, 130 F.3d at 1046. Judge Henderson disagreed with Judge Wald that regulation of the fly regulated the use of the channels of interstate commerce, but agreed that regulation of the fly's habitat substantially affected interstate commerce. *Id.* at 1057-58. Judge Sentelle dissented, finding that regulation of the fly was invalid under the Commerce Clause because there was no connection between the fly and interstate commerce. *Id.* at 1061. Because Judges Wald and Henderson could not concur on why regulation of the fly is valid under the Commerce Clause, their opinions merit scrutiny.

Judge Wald found that regulation of the fly's habitat could be sustained because "the provision prevents the destruction of biodiversity and thereby protects the current and future interstate commerce that relies upon it." *Id.* at 1052.

In finding that "biodiversity" is the link between species protection and commerce, Judge Wald asserted:

> Each time a species becomes extinct, the pool of wild species diminishes. This, in turn, has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes. Unlike most other natural resources, however, the full value of the variety of plant and animal life that currently exists is uncertain. Plants and animals that are lost through extinction undoubtedly have economic uses that are, in some cases, as yet unknown but which could prove vitally important in the future. A species whose worth is still unmeasured has what economists call an "option value" --the value of the possibility that a future

> discovery will make useful a species that is currently thought of as useless. To allow even a single species whose value is not currently apparent to become extinct therefore deprives the economy of the option value of that species. Because our current knowledge of each species and its possible uses is limited, it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce.

Id. at 1053 (reference omitted). In other words, Congress has the authority to regulate endangered species because Congress believes that human ignorance is the only barrier to commercial relevance for *every* species.

The problem with sustaining federal regulation on these grounds is obvious. If Congress can regulate based upon theoretical or speculative impacts on commerce, the commerce power is without limitation or, rather, is limited only by the imagination of Congress. In *Lopez*, this Court specifically rejected a similar argument based upon future impacts on commerce when it rejected the government's "costs of crime" reasoning. The government asserted that the Gun Free School Zones Act was valid because the presence of guns in schools poses a threat to learning, which results in a less productive citizenry, and thereby affects commerce. This Court found this rationale faulty because such a power would not be "enumerated" at all, but would instead be limitless: "Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Lopez*, 115 S. Ct. at 1632. This Court pointed out, if Congress could regulate activities on the basis that those activities potentially affect future commerce, the court would be "hard-pressed to posit any activity by an individual that Congress is without power to regulate." *Id.* In this case, the theoretical commercial impact endorsed by Judge Wald is not even tied to the activity being regulated. No

party to this case has alleged that the *fly itself* has a theoretical commercial value, only that *some indeterminate species* that may become extinct may prove to have commercial value *some time in the future*.

Indeed, Judge Henderson found fault with Judge Wald's conclusion that federal jurisdiction could rest upon future effects on commerce:

> [Judge Wald's] opinion acknowledges that it is "impossible to calculate the exact impact" of the economic loss of an endangered species. As far as I can tell, it is equally impossible to ascertain that there will be any such impact at all. It may well be that no species endangered now or in the future will have any of the economic value proposed. Given that possibility, I do not see how we can say that the protection of an endangered species has any effect on interstate commerce (much less a substantial one) by virtue of an uncertain potential medical or economic value.

NAHB, 130 F.3d at 1058. Notwithstanding this reasoning, however, Judge Henderson concluded that a species' existence has a *present* economic impact sufficient to sustain regulation of the fly based upon a theoretical link between species and commerce:

> The effect of a species' continued existence on the health of *other species* within the ecosystem seems to be generally recognized among scientists. . . . Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the extinction of one species affects others and their ecosystems and that the protection of a purely intrastate species (like the Delhi Sands Flower-Loving Fly) will therefore substantially affect *land and objects* that are involved in interstate commerce.

Id. at 1058-59 (emphases added). Like Judge Wald, Judge Henderson embraced the notion that Congress could regulate based upon a theoretical view--in this case, that some indeterminate species is essential to a given ecosystem, and that interstate commerce is dependent upon that ecosystem. However, Judge Henderson did not allege that the *fly itself* is essential, only that the fly could affect *other species* which may in turn affect *not* interstate commerce, but *land and objects* involved in interstate commerce.

A. The Decision of the Court Below, Finding That Congress Can Regulate Under the Commerce Clause Based upon Theoretical, Speculative, or Potential Effects Upon Interstate Commerce, Conflicts With the Fourth Circuit's Decision in *United States v. Wilson*

Though Judges Wald and Henderson could not agree on how and why "biodiversity" affects interstate commerce, both concluded that the federal government can regulate fly habitat because of a theoretical, speculative, or potential link between the fly's relevance to biodiversity and the impact of biodiversity on interstate commerce. However, the Fourth Circuit Court of Appeals has held that the Commerce Clause does not enable the federal government to exercise jurisdiction based upon potential or speculative impacts upon commerce.

On December 27, 1997, the United States Court of Appeals for the Fourth Circuit overturned the conviction of James J. Wilson, prosecuted under the Clean Water Act for filling a wetland without a permit, finding that the Army Corps of Engineers (Corps) had exceeded its authority by asserting jurisdiction over wetlands based upon their potential effects upon interstate commerce. *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

James J. Wilson has been developing a planned community in St. Charles, Maryland, since 1968. *Id.* at 254. In concert with county and federal housing authorities, Mr. Wilson engaged in

many land altering activities, including draining and grading property. *Id.* In 1992, the Corps issued a cease and desist order to Mr. Wilson, claiming that he had filled a wetland without a permit in violation of the Clean Water Act. *Id.* at 255. In a jury trial, Mr. Wilson was convicted and sentenced to 21 months in prison with one year of supervised release, and fined $1 million. *Id.* at 254.

On appeal, Wilson claimed that the Corps had no jurisdiction over the lands upon which he had conducted his draining and grading activities because they bore no relation to interstate commerce. *Id.* at 253. Specifically, he challenged the validity of the regulation under which the Corps asserted jurisdiction. The Clean Water Act prohibits the discharge, without a permit, of pollutants into "navigable waters." 33 U.S.C. §§ 1311(a), 1362(12)(A). The Act defines "navigable waters" as "waters of the United States." 33 U.S.C. § 1362(7). This Court understood that, by defining "navigable waters" to mean "waters of the United States," Congress intended to regulate some waters which are not considered "navigable" as that term is normally understood. *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133 (1985). However, the Army Corps of Engineers and the Environmental Protection Agency (EPA) further defined "waters of the United States" to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which *could affect* interstate or foreign commerce.

33 C.F.R. § 328.3(a)(3) (1993) (emphasis added). The Fourth Circuit found this broad assertion of jurisdiction invalid:

> This regulation purports to extend the coverage of the Clean Water Act to a variety of waters that are intrastate, nonnavigable, or both, solely on the basis

> that the use, degradation, or destruction of such waters *could affect* interstate commerce. The regulation requires neither that the regulated activity have a *substantial* effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate waters. Were this regulation a statute, duly enacted by Congress, it would present serious constitutional difficulties, because, at least at first blush, it would appear to exceed congressional authority under the Commerce Clause. . . . Absent a clear indication to the contrary, we should not lightly presume that . . . Congress authorized the Army Corps of Engineers to assert its jurisdiction in such a sweeping and constitutionally troubling manner.

Wilson, 133 F.3d at 257 (emphases in original). The Fourth Circuit struck the regulation, stating that the Corps' promulgation of the regulation exceeded its congressional authorization under the Clean Water Act. The government's petition for a rehearing was denied.

The exercise of federal jurisdiction by the Fish and Wildlife Service in this case is a direct parallel to the exercise of federal jurisdiction by the Army Corps of Engineers in *Wilson*. Nonetheless, the Fourth Circuit flatly rejected the idea that federal jurisdiction could be based upon speculative and potential effects upon commerce, rather than actual effects. Indeed, it is impossible to formulate a rational distinction between the cases that could explain the divergent results: if "biodiversity" is sufficient to confer jurisdiction over a species, the regulation of *any water*, upon which all life, and therefore all commerce, unquestionably depends, can hardly be beyond federal jurisdiction under the Commerce Clause.

This Court should grant the Petition for Writ of Certiorari to resolve the conflict between the Fourth Circuit and the District of Columbia Circuit as to whether speculative or potential effects

upon commerce are sufficient to sustain federal authority under the Commerce Clause.

B. The Seventh and Ninth Circuits Have Held That Federal Agencies Must Demonstrate an Actual and Specific Connection to Commerce in Order for Federal Agencies to Exercise Jurisdiction Under the Commerce Clause

The opinion below, which bases its commerce finding upon the notion that other species do or could affect interstate commerce, is also in conflict with opinions of the Seventh and Ninth Circuits requiring federal agencies to establish specific federal jurisdiction when attempting to regulate private land use. These circuits require that the federal regulatory agency demonstrate an *actual* connection between the regulated activity and a substantial impact on interstate commerce. In *Hoffman Homes, Inc. v. Administrator, United States Environmental Protection Agency*, 999 F.2d 256, 259 (7th Cir. 1993), and *Leslie Salt Co. v. United States*, 55 F.3d 1388,1392 (9th Cir. 1995), *cert. denied, Cargill, Inc. v. United States*, 116 S. Ct. 407 (1995) (both decided prior to *Lopez*), these Courts of Appeals addressed whether the federal government could assert jurisdiction under the Clean Water Act over isolated wetlands located on private property.

In *Hoffman Homes*, a developer filled a small wetland area in order to develop his property commercially. *Hoffman Homes*, 999 F.2d at 258. At issue was whether the EPA had jurisdiction consistent with the Commerce Clause to regulate the filling of an isolated wetland--that is, a wetland not connected to any interstate body of water. *Id.* at 260. The EPA argued that the connection between the wetland and interstate commerce was that wetlands serve as habitat for migratory birds, and that "millions of people annually spend more than a billion dollars on hunting, trapping, and observing migratory birds." *Id.* at 261. Though accepting this dubious commerce connection, the Seventh Circuit nonetheless concluded that the isolated wetland

was not subject to EPA jurisdiction because it found "the conclusion of EPA's [Chief Judicial Officer] that Area A was suitable for migratory bird habitat to be unsupported by substantial evidence on the record as a whole." *Id.* at 262. The result of this decision was to require EPA to demonstrate that the specific regulated site was actually used by migratory birds. Potential use, or use by migratory birds of wetlands in general, was insufficient to validate application of the regulation. Instead, EPA had to show that the specific wetland in dispute substantially affected interstate commerce.

However, unlike the court in *Hoffman Homes*, the court below in this case accepted the very arguments rejected by the Seventh Circuit as untenable. Here, Fish and Wildlife argued that its general authority to regulate wildlife under the Endangered Species Act enables it to extend its jurisdiction to Delhi Sands Flower-Loving Fly habitat, whether or not the fly affects interstate commerce. Under *Hoffman Homes*, Fish and Wildlife's authority to regulate *some* wildlife and *some* activities does not empower the government to regulate *every* activity related to wildlife without demonstrating a case-specific impact on interstate commerce. Further, while EPA could not simply aggregate "all wetlands" into a class to validate its jurisdiction, Fish and Wildlife here contends that it may aggregate every variety of wildlife to demonstrate a substantial effect on commerce. The decision below conflicts with the Seventh Circuit's requirement that a federal regulatory agency must show an actual and specific connection between an activity and interstate commerce.

In *Leslie Salt*, the Ninth Circuit reached essentially the same conclusions as the Seventh Circuit in *Hoffman Homes*. In *Leslie Salt*, the issue was whether, under the Clean Water Act, the Army Corps of Engineers could prohibit the filling of evaporation pits the company had created for salt manufacture. *Leslie Salt*, 55 F.3d at 1390-91. Though the Ninth Circuit accepted the Army Corps of Engineers' "migratory bird"

argument (conceding that it "tests the limits of Congress' commerce powers and, some would argue, the bounds of reason," *id.* at 1396), it also acknowledged that the Corps' jurisdiction depended upon "the property's *specific connections to interstate commerce* due to migratory bird use." *Id.* at 1392 (emphasis added). Justice Thomas underscored the burden that the government must show to assert jurisdiction under the Commerce Clause:

> [T]hat substantial interstate commerce depends on the continued existence of migratory birds does not give the Corps *carte blanche authority to regulate every property that migratory birds use or could use as habitat.* The point of *Lopez* was to explain *that the activity on the land to be regulated must substantially affect interstate commerce* before Congress can regulate it pursuant to its Commerce Clause power.

Cargill, Inc., 116 S. Ct. at 409 (Thomas J., dissenting from the denial of certiorari) (emphases added).

In *Hoffman Homes* and *Leslie Salt*, the government was not entitled to exercise jurisdiction over a specific wetland on the basis of a wetland's potential effect on commerce, nor could the government rely on its authority to regulate wetlands in general. The federal government was required to demonstrate a connection between the *actual, specific activity being regulated* and its *effect on interstate commerce* in order to sustain jurisdiction. These holdings are in direct conflict with the decision of the court below, which held that theoretical, speculative, or potential effects on interstate commerce are sufficient to confer federal jurisdiction under the Commerce Clause.

CONCLUSION

Congress has numerous means at its disposal to regulate interstate commerce in wildlife. It employed some of those means in Section 9 of the Endangered Species Act. However, no matter how lofty the goal, Congress may not reach beyond its constitutionally enumerated powers. Specifically, this Court has never countenanced the proposition that Congress could use theoretical, speculative, or potential effects upon commerce as a basis for exercising sweeping federal jurisdiction.

The court below held that the federal government need not demonstrate a connection between an activity being regulated and its effect upon interstate commerce. Rather, the court held that a theoretical link between the activity being regulated and interstate commerce was sufficient to confer federal jurisdiction. Because the decision of the court below conflicts with the Fourth, Seventh, and Ninth Circuits' understanding of federal jurisdiction under the Commerce Clause, and this Court's precedent in *United States v. Lopez*, this Court should grant the Petition for Writ of Certiorari.

DATED: April, 1998.

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No. 97-1451

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, ET AL.
Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, ET AL.
Respondents.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the District of Columbia Circuit

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BRIEF FOR AMERICAN CONSULTING ENGINEERS COUNCIL AND CONSULTING ENGINEERS AND LAND SURVEYORS OF CALIFORNIA, *AMICI CURIAE*, IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Pages

Interest of the *Amici* 1

Argument 3

1. The question presented has recurring and wide-ranging importance 3
2. Review by this Court is urgently required 4
3. The decision below is erroneous, being in conflict with *United States v. Lopez* 5

Conclusion 11

TABLE OF AUTHORITIES

Cases

Pages

Cargill v. United States,
516 U.S. 955 (1995) 5

Northern Securities Co. v. United States,
193 U.S. 197 (1904) 8

United States v. Lopez,
514 U.S. 549 (1995) ..... passim

Statute

Endangered Species Act,
§9(a)(1)(B), 16 U.S.C. §15389(a)(1)(B) ..... passim

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INTEREST OF THE *AMICI*

Counsel[1] for Petitioners and the Solicitor General on behalf of the federal Respondents have consented to the filing of this brief.[1] *Amici curiae*, the American Consulting Engineers Council ("ACEC") and

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[1] No counsel for a party authored any part of this brief and no one other than *amici curiae* made any monetary contribution to the preparation or submission of the brief.

Consulting Engineers and Land Surveyors of California ("CELSOC") are adversely affected by the decision below.

The ACEC is the largest national organization of consulting engineers, comprised of 52 state and regional member organizations representing more than 5,700 independent engineering firms throughout the United States. These firms employ more than 250,000 engineers, architects, land surveyors, scientists, technicians, and other professionals who design roughly $100 billion of private and public works annually.

The CELSOC is a statewide association of consulting engineers and land surveyors, comprised of 24 local chapters representing more than 1,000 consulting engineering and land surveying firms. The CELSOC is the largest member organization in the ACEC.

The ACEC and CELSOC seek to strengthen the business environment of member firms and enhance and expand market opportunities for those firms.

They are, therefore, concerned with any judicial decision that presents an important issue of federal law with significant practical consequences for land use. Here, the Court of Appeals has sanctioned broad application of the Endangered Species Act to species found only within a single state. Many members of the ACEC and CELSOC plan, design, and carry out

activities that would be regulated and perhaps prohibited by the Endangered Species Act as interpreted by the decision below. That decision, thus, adversely affects the number, scope, and costs of projects that provide work for the members of these organizations. Their interest in the Court's review and eventual reversal of the decision is therefore direct.

ARGUMENT

1. The question presented has recurring and wide-ranging importance.

The decision below has very serious consequences. Most immediately, prohibiting disturbance to the habitat of a purely local, non-migrating, insect significantly affects land use, whether by private owners or public authorities (as in the present case). Although the Delhi Sands Flower-Loving Fly involved here is confined to forty square miles in two California counties, the ruling necessarily condones like regulation of the habitat of any other endangered species, animal or plant, that is similarly localized. At present, we are told, there are more than 500 such species, distributed throughout the Nation.

The practical impact of the decision on land development is obvious enough. But, perhaps more relevant to this Court's disposition of the petition is the effect of the ruling on the constitutional balance between Federal and State powers. The Court of Appeals has approved regulation of local land use by a federal agency, invoking the interstate commerce

power, in a setting that involves no commercial activity and only the most tenuous interstate concerns. The rationale of the decision—so far as there is any common ground between the judges in the majority—is very open-ended, in no way confined to the Endangered Species Act ("ESA"). And its impact is especially great because the ruling emanates from the Court of Appeals for the District of Columbia, which effectively has a nation-wide jurisdiction in reviewing federal agency action.

2. **Review by this Court is urgently required.**

The several opinions in this case, producing no opinion of the Court and dividing as to the result, reflect the difficulty the Courts of Appeal are experiencing in defining the boundaries of federal power under the Commerce Clause. The petition fully documents the prevailing disarray (Pet. 6 - 15). Only this Court can definitively resolve the debate and the present case is a proper vehicle for so doing.

Of course, the call for intervention is especially appropriate in this instance because the stimulus of the debate in the lower courts is this Court's own recent decision in *United States v. Lopez*, 514 U.S. 549 (1995). Four years on, it is not clear to all whether that ruling is to be viewed as a "sport" in the law or, on the contrary, is a seminal milestone. Too often, *Lopez* has been distinguished away and the Court has remained mute. *But see*, Thomas, J., dissenting from the denial of cert. in *Cargill, Inc. v. United States*, 516 U.S. 955 (1995). If, as we suggest in a moment, the decision below conflicts

with *Lopez*, the Court ought to say so. The lower courts, the federal regulators, the Congress, the State legislatures, as well as affected private interests, are entitled to clarification as to the true meaning of *Lopez*. To further prolong the continuing debate over the limits of the Commerce Clause is unhealthy for our constitutional arrangements.

3. The decision below is erroneous, being in conflict with United States v. Lopez.

The obvious difficulty of tying to interstate commerce "harm" to a purely local endangered insect is reflected in the fractured decision below. Only two members of the three-judge panel could find any such tie, and they could not agree on a single rationale. In our submission, Judge Sentelle, in dissent, has convincingly answered the several claims of interstate commerce connection. Nevertheless, we briefly examine each of them, articulating additional objections.

(a) Means of "enabl[ing] the government to control the transport of the endangered species in interstate commerce." One judge below thought the prohibition of the taking of a localized endangered species could be justified on this theory. (Pet. App. 34a-38a). It is noted that the ESA prohibits "transporting and selling endangered species in interstate commerce" (Pet. App. 35a), and it is suggested that the ban on "taking" such a species is "a necessary aid." *Ibid.* One could perhaps accept this reasoning as applied to a species with commercial value that might be captured

with a view to its sale in interstate commerce. But there is no trade in the Delhi Sands Flower-Loving Fly, and the only "takings" that occur are killings, not captures. In *this* case, therefore, the prohibition on "takings" does not remotely assist the ban on interstate transactions.

Here, as elsewhere in the first opinion below, a basic flaw is the "lumping together" of all endangered species. The present case, however, does not challenge the "takings" provision of the ESA on its face, but only *as applied* to a species that neither migrates interstate nor is the subject of interstate commerce. The "cumulative impact" principle does not justify invoking the effect of taking *other* species on interstate commerce in weighing the constitutionality of the ban in suit. Congress cannot avoid Commerce Clause boundaries by casting an overwide net that includes *some* constitutional provisions or applications. The law struck down in *Lopez* would not have survived had it been merely one section of a broader gun control statute, most of which was valid.[2]

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[2] It may be, of course, that a *facial* challenge to a statute *as a whole* will fail if some parts of the law pass constitutional muster. But the present case is a limited attack, focused solely on the "take" provision of the ESA as applied to non-commercial sedentary species. The constitutional question, in this setting, is no different than if that discrete subject were addressed in a separate statute.

(b) "Prevent[ing] the channels of interstate commerce from being used for immoral or injurious purposes." The proposition that the Commerce Clause authorizes regulation with such an aim is, of course, well settled. But the application of that principle here is less than obvious, and, indeed, the opinion below invoking it does not explain its relevance to our case. (*See* Pet. App. 38a-40a). One can posit that removing an endangered species from its habitat is "immoral or injurious" and that prohibiting the capture of an endangered species for which there is an interstate market would help to keep the channels of interstate commerce pure. But, again, this rationale is wholly inapposite when, as here, there is no trade in the species, dead or alive.

(c) "Prevent[ing] the destruction of biodiversity." Unquestionably, protecting *any* endangered species from extinction helps to preserve the existing diversity of plant and animal life, and the value of that goal may be accepted. (*See* Pet. App. 49a-57a). But it simply does not follow that the threat to every endangered species has a "substantial effect" on interstate commerce. Here, the potential future of interstate commerce in the particular fly at issue is entirely conjectural and, one may add, unlikely. Once again, the claim advanced depends on a false aggregation of the impact of eliminating *all* endangered species, including those with existing commercial uses. (*See* Pet. App.54a-55a, n. 14). This is akin to sustaining the statute involved in *Lopez*, because *some other*

transactions in handguns would implicate interstate commerce.

(d) "Substantial effect on our ecosystem." Although rejecting Judge Wald's "biodiversity" argument as too conjectural, Judge Henderson posited a related, but grander, theory. It is summed up in the following sentence: "Given the interconnectedness of species and ecosystems, it is reasonable to conclude that the protection of a purely intrastate species (like the Dehli Sands Flower-Loving Fly) will therefore substantially affect land and objects that are involved in interstate commerce." (Pet. App. 70a). This is a breathtakingly wide proposition, which, despite a disclaimer (Pet. App. 72a, n. 6), has no logical stopping place and must therefore be rejected. It will not do to sustain Commerce Clause jurisdiction on the principle that, in some degree, everything is interconnected. This point was made long ago: "Commerce depends upon population, but Congress could not, on that ground, undertake to regulate marriage and divorce." *Northern Securities Co. v. United States*, 193 U.S. 197, 402 (1904) (Holmes, J., dissenting). More importantly, it was forcibly re-iterated in *Lopez*. 514 U.S. at 564, 565, 567.

(e) "Prevent[ing] destructive interstate competition." Whatever its validity in a different context, this is not the place to invoke the proposition that the Commerce Clause authorizes Congress to enact (whether in the name of health, morality or environmental protection) uniform national standards for local enterprise so as to assure a "level playing

field" among the States in respect of their ability to compete in attracting out-of-state business or the ability of local industries to sell domestic products elsewhere. (Pet. App. 58a-65a). Once again, it must be stressed that the Delhi Sands Flower-Loving Fly has never been an article of interstate commerce. Moreover, even if our focus is widened to embrace *all* endangered species, the rationale fails since interstate commerce in them is banned in every case. To be sure, it may be that the unequal burdens on commerce in *other commodities* would result from endangered species regulation if there were no uniform national law. But there is no precedent for treating such a remote effect as sufficient. The theory has no limits, equally justifying federal fixing of local property tax rates and federal control of local schools, matters that doubtless affect of the State's competitive "attractiveness" to out-of-state business or prospective migrants.

(f) The effect of regulation on interstate commerce. The most novel justification for reaching the taking of the fly under the Commerce Clause is advanced by Judge Henderson's concurrence, in which she finds the necessary effect by noticing the impact of the regulation in this case. (*See* Pet. App. 70a-72a). This is a classic instance of putting the cart before the horse. The proper question is whether the activity sought to be regulated—here the "taking" of the fly—substantially affects interstate commerce, not whether *such regulation* would impact interstate commerce.

In sum, there is no viable rationale for a federal prohibition on harm to non-commercial isolated species under the Commerce Clause. The teaching of *Lopez* is that courts may not invoke a remote and tenuous link with interstate commerce by "pil[ing] inference upon inference" when no such connection is "visible to the naked eye." 514 U.S. at 563, 567. Especially is this so when the activity sought to be regulated is not inherently "economic activity" (*id.* at 560-561)[3] and is traditionally left to State regulation (*id.* at, 561 n.3, 564, 567, when the challenged federal law "contains no jurisdictional element that would ensure, through case-by-case inquiry," that the only activity regulated is one which actually affects interstate commerce (*id.* at 561), and when there are no relevant legislative findings purporting to discern a link with interstate commerce (*id.* at 563).[4] In each respect, the present case is like *Lopez* and ought to be decided accordingly.

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[3] Although the project that triggered this litigation, the proposed construction by the County of San Bernardino of a hospital and associated power station and traffic intersection, is not a private commercial venture, it can be characterized as "economic activity." But the ESA's prohibition on "harming" an endangered species equally applies to a homeowner tending his lawn.

[4]The Committee Reports cited by Judge Wald and Judge Henderson hardly qualify as legislative findings that harm to a sedentary and so-far-as-presently-known economically valueless species substantially affects interstate commerce. At best, the Reports reflect the view that such species

CONCLUSION

For the reasons stated here and in the Petition, certiorari should be granted.

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April 3, 1998

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potentially may, at some future day, have some commercial use. *See* Pet. App.45a-48a, 69a.

(6)

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BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, AND MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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15 pp

QUESTION PRESENTED

Whether, consistent with the Commerce Clause, the United States Fish and Wildlife Service may regulate the "taking" of an endangered fly that lives solely within an eight-mile radius in California, has never been transported or traded in interstate commerce, and has no commercial value, solely on the basis that species protection in general "substantially affects" interstate commerce.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

INTERESTS OF THE *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT . . . 2

ARGUMENT 4

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CONSTITUTIONALITY OF THE SERVICE'S ACTION BASED UPON SPECULATION ABOUT THE COMMERCIAL EFFECTS OF BIODIVERSITY 4

II. THE COURT OF APPEALS ERRED IN ANALYZING THE COMMERCIAL EFFECT OF THE REGULATION ITSELF, RATHER THAN THE COMMERCIAL EFFECT OF THE ACTIVITY BEING REGULATED 8

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: *Page*

Champion v. *Ames*, 188 U.S. 321 (1903) 7

NLRB v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) 10

United States v. *Lopez*, 514 U.S. 549 (1995) . . . . *passim*

United States v. *Pappadopoulos*, 64 F.3d 522 (9th Cir. 1995) 9

United States v. *Wall*, 92 F.3d 1444 (6th Cir. 1996) . . 6

United States v. *Wilson*, 133 F.3d 251 (4th Cir. 1997) . 4

Wickard v. *Filburn*, 317 U.S. 111 (1942) 5, 6

BRIEF *AMICUS CURIAE* OF THE AMERICAN FARM BUREAU FEDERATION AND CALIFORNIA FARM BUREAU FEDERATION

INTERESTS OF THE *AMICI CURIAE*[1]

The American Farm Bureau Federation ("AFBF") is a voluntary general farm organization established in 1920 under the General Not-For-Profit Corporation Act of the State of Illinois. AFBF was founded to protect, promote, and represent the business, economic, social, and educational interests of American farmers and ranchers. AFBF has member organizations in all 50 states and Puerto Rico, representing more than 4.8 million member families. AFBF has participated as an *amicus* in this Court in support of property rights in cases such as *Lucas* v. *South Carolina Coastal Council*, *Dolan* v. *City of Tigard*, *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, *Bennett* v. *Spear*, and *Suitum* v. *Tahoe Regional Planning Agency*. *Amicus* California Farm Bureau Federation is a constituent member of AFBF, representing the interests of farmers and ranchers in the State of California, where the property at issue in this case is located.

The AFBF and California Farm Bureau Federation have a direct stake in the outcome of this case. Their farmer and rancher members own or lease significant amounts of land, and their ability to use it productively is critical not only to their livelihoods, but to the nation's supply of food and other basic necessities. Their land is increasingly subject to control by federal authorities acting under statutes such as the Endangered Species Act ("ESA" or "Act") and Clean Water

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amici curiae*, their members, and their counsel made a monetary contribution to the preparation and submission of this brief.

Act. *Amici*, therefore, have a vital interest in ensuring that the Commerce Clause is interpreted reasonably, so as to limit federal regulation of local land use to activities that "substantially affect" interstate commerce.

In particular, farmers' and ranchers' use of their land has been severely restricted by application of ESA section 9 to ordinary, everyday farming activities that, according to the Fish and Wildlife Service ("Service"), constitute "habitat modification." By adopting overly broad interpretations of the ESA, the Service threatens to criminalize, as a matter of federal law, many well-accepted agricultural practices, and to chill the most productive uses of land. In consequence, *amici* have a strong interest in reversal of the Court of Appeals' ruling that the Commerce Clause authorizes federal regulation of land use affecting the habitat of a fly that lives solely in a small region of a single state, has never been transported or traded in interstate commerce, and has no commercial value.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court established clear limitations on the scope of federal power pursuant to the Commerce Clause. To withstand a Commerce Clause challenge, federal regulation must regulate "activities that substantially affect interstate commerce." *Id.* at 558-559.

In this case, the Service applied the ESA to regulate the habitat of the Delhi Sands Flower-Loving Fly ("Fly")—an insect that does not exist outside an eight-mile radius in California, has never been transported or traded in interstate commerce, and has no commercial value. Pet. App. 25a, 42a-45a, 67a, 80a. The Service charged that San Bernardino County's construction of a public hospital complex would disturb the Fly's habitat, in violation of the Act. *Id.* at 73a. The County attempted to accommodate the Service—at an

additional cost to taxpayers of $3.5 million—by moving the complex some 250 feet, setting aside 8.35 acres of adjacent land as Fly habitat, and preserving a 100-foot wide "flight corridor" for the Fly. *Id.* at 29a. When it became clear, however, that preserving so broad a flight path prevented the County from modifying a nearby traffic intersection to ensure emergency access to the hospital, the parties reached an impasse, and this lawsuit ensued. *Id.* at 30a, 73a.

Purporting to apply *Lopez*, the Court of Appeals sustained the Service's actions. Although the majority opinions rested on different rationales, both held, in essence, that the mere "possibility" that the Fly might one day affect interstate commerce is sufficient to sustain federal regulation of its habitat. Pet. App. 52a. As this Court explained in *Lopez*, however, an activity does not "substantially affect" interstate commerce if one must "pile inference upon inference" to establish a nexus between the regulated activity and interstate commerce. 514 U.S. at 567. Rather, the Constitution requires some "concrete tie to interstate commerce." *Ibid.*

The decision below effectively repudiates the *Lopez* standard. First, the Court of Appeals impermissibly substituted generalities for concrete analysis. Openly acknowledging that even the *complete* destruction of the Fly's habitat would have no discernible impact on commerce, much less a substantial one, Judges Wald and Henderson each relied on Congress's purported interest in preventing habitat destruction *as a whole—i.e.*, in preserving "biodiversity"—to sustain the Service's actions. Pet. App. 54a, 68a. As we show in Part I, this unfocused approach contravenes the admonition of *Lopez* that Congress may regulate only noncommercial activities "hav[ing] an explicit connection with or effect on interstate commerce." 514 U.S. at 562.

Second, the Court of Appeals focused on the effect of federal regulation, rather than on the effect of the activity

being regulated, to conjure up a "substantial" effect on interstate commerce. As shown in Part II, however, if such a construction prevails, the Commerce Clause will no longer serve as a limiting principle, but rather will permit Congress to regulate virtually every area of law traditionally relegated to the States—a result completely inconsistent with the reasoning of *Lopez* and the intent of the Framers.

This case is of immense practical importance. Of the 1,082 species now designated as threatened or endangered, 521 (nearly half) are found in only one state. Pet. App. 50a. Thus, whether the Service may regulate activity affecting the habitats of such one-state species has recurring significance. Moreover, the decision below has implications in other areas, such as the Corps of Engineers' regulation of isolated wetlands under the Clean Water Act, in which Commerce Clause challenges commonly occur. See, *e.g.*, *United States* v. *Wilson*, 133 F.3d 251 (4th Cir. 1997). Immediate review of the Court of Appeals' erroneous decision is essential to preserve private land use and local regulation from constitutionally unwarranted federal interference.

The Court of Appeals sustained federal regulation of a species "which is neither commerce nor interstate." Pet. App. 76a. If the *Lopez* decision is to prove more than an aberration, this Court should grant certiorari to clarify the scope of Congress's Commerce Clause power.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN UPHOLDING THE CONSTITUTIONALITY OF THE SERVICE'S ACTION BASED UPON SPECULATION ABOUT THE COMMERCIAL EFFECTS OF BIODIVERSITY

In *Lopez*, this Court stressed the importance, in decisions delimiting the scope of federal power under the Commerce

Clause, of a *particularized* inquiry into the relationship between the economic activity being regulated and interstate commerce. "[D]epending on the level of generality, any activity can be looked upon as commercial." 514 U.S. at 565. Thus, the commerce power is limited to laws affecting "a commercial transaction, which viewed in the aggregate, substantially affects interstate commerce." *Id.* at 561.

The decision of the Court of Appeals demonstrates how courts can evade the holding of *Lopez* by categorizing conduct at an exceedingly high level of generality. Rather than look to the particular subject of the regulation at issue—the Fly—to determine whether the aggregate effects of degrading *its* habitat substantially affect interstate commerce, the majority opinions below focused on the commercial effects of biodiversity in general. Judge Wald, for example, openly acknowledged that "it is impossible to calculate the exact impact that the loss of the option value of a single species might have on interstate commerce." Pet. App. 54a. Nonetheless, she reasoned, "[i]n the aggregate" it is "certain that the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce." *Id.* Judge Henderson similarly concluded that "the loss of biodiversity itself has a substantial effect on our ecosystem and likewise on interstate commerce." *Id.* at 68a.

The relevant level of generality, however, is not the aggregate commercial effect of *species* degradation, but the aggregate commercial effect of activities that degrade the habitat of *the Fly*. *Wickard* v. *Filburn*, 317 U.S. 111 (1942), is instructive on this point. In that case, the Secretary of Agriculture assessed a penalty on an Ohio farmer for harvesting more wheat than was allotted under the Agricultural Adjustment Act of 1938. Because the penalty was calculated on the basis of wheat grown solely for on-farm consumption, the farmer challenged the application of the

Act, contending that such wheat was not part of interstate commerce.

The Court rejected that argument—not on the ground that agricultural transactions as a whole substantially affect interstate commerce—but by engaging in a particularized inquiry into the aggregate commercial effects of on-farm *wheat* production. 317 U.S. at 125-127. Noting that an individual farmer's "contribution to the demand for wheat may be trivial by itself," the Court found it dispositive that such a contribution, when "taken together with that of many others similarly situated, is far from trivial." *Id.* at 127-128. Viewed as a whole, "a factor of such volume and variability as home-consumed wheat would have a substantial influence on price and market conditions." *Id.* at 128. Even "assum[ing] that it is never marketed, it supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market. Home-grown wheat in this sense competes with wheat in commerce." *Ibid.*

Even under *Wickard*'s reasoning—"which is perhaps the most far reaching example of Commerce Clause authority over intrastate activity" (*Lopez*, 514 U.S. at 560)—the relevant focus is not on the aggregate commercial effect of the *class* of activity to which the regulated activity belongs (agricultural transactions there, species degradation here), but on the aggregate commercial effect of the *specific activities* at issue in the case (on-farm wheat consumption there, degradation of the Fly's habitat here). The Court of Appeals, however, focused on species protection in general. Only by resorting to so exaggerated a level of generality could the Court of Appeals discern a substantial effect on interstate commerce. In so doing, however, the D.C. Circuit dispensed with any "meaningful limits on the commerce power." *Lopez*, 514 U.S. at 580 (Kennedy, J., concurring). See Pet. App. 82a (Sentelle, J., dissenting); *United States* v. *Wall*, 92 F.3d 1444, 1462 (6th Cir. 1996) (Boggs, J., dissenting in

part) (rationales offered to support constitutionality of federal regulation must have "a logical stopping point").

This is not to say that federal agencies are forbidden from regulating individual instances of species degradation that *do* substantially affect commerce. See *Lopez*, 514 U.S. at 561-562. For example, it would undoubtedly be constitutional for the Service to enforce the ESA against persons who sought to capture the Fly and transport it for sale. See, *e.g.*, *Champion* v. *Ames*, 188 U.S. 321 (1903). But engaging in activities that incidentally affect the habitat of a localized insect—whether constructing a public hospital or clearing a field for sowing—cannot be deemed to "substantially affect" commerce, as contemplated by *Lopez*.

Indeed, there is no evidence whatsoever that the Fly has any commercial value or effect, nor any sign that the Service, before listing the Fly and calling a halt to the County's hospital project, ascertained the requisite connection with commerce. See Pet. App. 67a (Henderson, J., concurring). Moreover, the Service has no constitutional authority to regulate purely noncommercial activities solely because "it is not beyond the realm of possibility" (*id.* at 52a) that they might one day affect commerce. See *id.* at 85a (Sentelle, J., dissenting) ("A creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce").

As this Court explained in *Lopez*, federal power reaches only "intrastate activities that 'have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions' [that] are within Congress' power to regulate." 514 U.S. at 555. Regulation of the Fly's habitat bears no such relation to interstate commerce. As Judge

Sentelle explained in dissent below, "preventing destruction of local flies cannot reasonably be held to be either 'necessary' or 'proper' to keeping the channels of commerce free from their interstate transportation. While prohibiting the local possession and exchange of flies might arguably be necessary to preventing interstate transportation or exchange of flies, prohibiting destruction of fly habitat is not." Pet. App. 80a n.1. In sum, one must "pile inference upon inference" to find any sort of "concrete tie" between the Fly and interstate commerce. See *Lopez*, 514 U.S. at 567. To do so, however, would obliterate the "distinction between what is truly national and what is truly local." *Id.* at 567-568.

II. THE COURT OF APPEALS ERRED IN ANALYZING THE COMMERCIAL EFFECT OF THE REGULATION ITSELF, RATHER THAN THE COMMERCIAL EFFECT OF THE ACTIVITY BEING REGULATED

The Court of Appeals also erred in focusing on the commercial effect of the regulation, rather than on the effect of the activity being regulated. Judge Wald, for example, was persuaded by the fact that the ESA "regulates the taking of endangered species in the process of constructing a hospital, power plant, and intersection that will likely serve an interstate population." Pet. App. 63a. Similarly, Judge Henderson reasoned that "protection of the flies regulates and substantially affects commercial development activity which is plainly interstate." Pet. App. 68a. As the dissent recognized, however, "[n]owhere is it suggested that Congress can regulate activities not having a substantial effect on commerce because the regulation itself can be crafted in such a fashion as to have such an effect." Pet. App. 90a.

Indeed, if the federal government may regulate a noncommercial activity on the basis that the regulation *itself* causes a remote downstream effect on commerce, the

Commerce Clause as a limitation on federal power will be rendered a nullity. This logic would permit federal agencies to regulate marriage and divorce—traditional concerns of state law—on the ground that such regulation would have a substantial effect on the interstate market for family law services. And federal agencies could regulate primary schools—also a traditional state law concern—on the basis that such regulation would substantially affect the interstate market for school supplies or, as the court below found, "the current and future interstate commerce that relies on the availability of a diverse [supply of labor]." See Pet. App. 50a-51a. Regulation of local land use affecting a local species habitat is no more commercial than primary education, familial relations, or gun possession. See *id.* at 84a. Based on *Lopez*, all should be free from the heavy hand of federal regulation. See 514 U.S. at 565-567.

Contrary to the Court of Appeals (Pet. App. 42a-45a), it is not irrelevant "whether an intrastate activity is commercial or noncommercial." See *Lopez*, 514 U.S. at 566. While *Lopez* does not require that a regulated activity *directly* affect interstate commerce, it recognizes that there must be a point at which the activity's commercial effect becomes too tenuous to justify federal regulation. See *id.* at 567 ("There is a view of causation that would obliterate the distinction of what is national and what is local in the activities of commerce"); *United States* v. *Pappadopoulos*, 64 F.3d 522, 527 (9th Cir. 1995) (invalidating application of federal arson statute where only tie to interstate commerce was residence's receipt of out-of-state natural gas). Just as "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce" (514 U.S. at 567), neither is disturbance of the Fly's habitat. See Pet. App. 84a (Sentelle, J., dissenting) ("Neither killing flies nor controlling weeds nor digging holes is either inherently or funda-

mentally commercial in any sense"). In short, the specific "activity in question" must have a "concrete tie to interstate commerce," and no such tie has been shown here. 514 U.S. at 563, 567.

* * *

This is a case in which the Commerce Clause has been "extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937) (Hughes, C.J.).

The Service seeks to regulate the construction of a county hospital—an activity traditionally left to the domain of local land use law—solely because the facility threatens the habitat of a handful of flies that live only within an eight-mile radius in California, have never been traded in interstate commerce, and are totally devoid of commercial value. The decision below, if permitted to stand, threatens not only a badly needed county hospital in California, but vital public and private land use activities conducted every day throughout the country. If the constitutional limits on the commerce power set forth in *Lopez* are not to be rendered meaningless—and if the great experiment in federalism launched by the Framers is not to be shelved—the decision below must be reversed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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No. 97-1451

In The

Supreme Court of the United States

October Term, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FUND, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR
and
MOLLIE BEATTIE, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN LAND FOUNDATION AND TEXAS JUSTICE FOUNDATION IN SUPPORT OF PETITIONERS

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35pp

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities iii

I. Interest of the *Amici Curiae* 1

II. Summary of Argument 3

III. Reasons For Granting Certiorari 4

A. Introduction 4

B. The Circuit Court's main and concurring opinions below sharply conflict with this Court's decision in *United States v. Lopez* 6

1. Lopez's three-part "substantial effects" analysis was ignored by Judges Wald and Henderson 6

a. The Wald opinion concedes that the regulated activity is non-commercial, but then ignores the ramifications of that critical determination; the Henderson opinion simply ignores the issue 6

b. The Wald and Henderson opinions do not even acknowledge that the take provision lacks a jurisdictional element, much less assign the proper significance to its absence 9

c. The rationales offered in the Wald and Henderson opinions are either inapposite or place no logical stopping point on Congress' Commerce Clause authority 10

TABLE OF CONTENTS – Continued

Page

d. When Congress enacts a regulation that intrudes into an area of traditional state authority, the regulation should be reviewed with heightened scrutiny because it upsets the federal-state balance 13

2. The take provision cannot be upheld as a regulation of the "channels of commerce." 14

C. Lower court decisions involving congressional regulation of intrastate, non-commercial activity routinely misapply the analysis in *Lopez* 16

1. The "aggregation" and "class of activities" principles are routinely misapplied by lower courts in a case dispositive manner 17

2. The lower courts are avoiding Lopez's substantial effects analysis by shoehorning cases into the "channels of commerce" and "articles of commerce" categories 18

IV. Conclusion 20

TABLE OF AUTHORITIES

Page

CASES

A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) 4

Baldwin v. Montana Fish and Game Comm'n, 436 U.S. 371 (1978) 14

Brzonkala v. Virginia Polytechnic Institute, 132 F.3d 949 (4th Cir. 1997) 17

Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141 (1982) 14

Gregory v. Ashcroft, 501 U.S. 452 (1991) 5

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) ..... *passim*

National Ass'n of Home Builders v. Babbitt, 949 F.Supp 1 (D.D.C. 1996) 2

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 4

Perez v. United States, 402 U.S. 146 (1971) 7

Sierra Club v. San Antonio, et al., 112 F.3d 789 (5th Cir. 1997) 2

United States v. Kirk, 70 F.3d 791 (5th Cir. 1995) 19

United States v. Lopez, 514 U.S. 549, 115 S.Ct. 1624 (1995) ..... *passim*

United States v. Olin Corp., 107 F.3d 1506 (11th Cir. 1997) 17

United States v. Pappadopoulos, 64 F.3d 522 (9th Cir. 1995) 9, 19

Wickard v. Filburn, 317 U.S. 111 (1942) 7, 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION AND STATUTES

§ 9(a)(1)(B) 3, 10

§ 9(a)(1)(E) 10

§ 9(a)(1)(F) 10

§ 9(a)(2)(C) 10

§ 9(a)(2)(D) 10

Introduction to Volume 19, 19 HARVARD J. L. PUB. POL. 1 (1995) 5

U.S. Const. amend. X 13

I. Interest of the *Amici Curiae*

Amici Curiae American Land Foundation and Texas Justice Foundation (collectively referred to as "the Foundations" or *"amici"*)[1] respectfully submit this *amici curiae* brief in support of Petitioners because the Circuit Court decision below badly misreads this Court's landmark Commerce Clause decision in *U.S. v. Lopez* and thereby improperly upholds Congress' authority to regulate takes of the Delhi Sands Flower-loving Fly ("the Fly") – a purely intrastate, non-commercial activity that has no discernable effect upon interstate commerce and is not part of a commercial regulatory regime.

American Land Foundation is a 501(c)(3) non-profit organization dedicated to the advancement, protection and renewal of property rights and the constitutional principles of individual liberty, limited government, free enterprise and the freedom envisioned by our Founding Fathers. American Land Foundation was created by the Farm Credit Bank of Texas to provide a voice for the many small farmers and ranchers whose interests – preservation of property rights and the American farming and ranching heritage – are often threatened by the increasingly intrusive nature of governmental land use regulations.

Texas Justice Foundation is a 501(c)(3) non-profit organization that provides free legal representation in landmark cases to protect individual rights and limit

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[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amici Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

government to its appropriate role. Texas Justice Foundation seeks to protect, through litigation and education, those fundamental freedom and rights essential to the preservation of American society. To reinvigorate public education, strengthen the family, and promote the private sector business climate we must limit government to its traditional and appropriately limited role. Texas Justice Foundation seeks to protect those mediating structures – such as church, synagogue, home, and private business – which provide a bulwark of freedom for the individual against excessive intrusion of government. American Land Foundation sought and obtained[2] *amicus curiae* status at the Circuit court level and the Foundations now jointly seek *amici curiae* status here because the Endangered Species Act ("ESA") and Commerce Clause issues before this Honorable Court are very similar to litigation the Foundations have been involved in and which was recently decided by the Fifth Circuit Court of Appeals. *Sierra Club v. San Antonio, et al.*, 112 F.3d 789 (5th Cir. 1997), *cert. denied*, 118 S.Ct. 879 (1998). While the Fifth Circuit acknowledged the Commerce Clause issue presented, it declined to reach the issue because the case could be decided on non-constitutional grounds. *Id.*

To *amici's* knowledge, there have been no reported decisions on the Commerce Clause issue as applied to the ESA other than this case[3] since the Supreme Court's landmark decision in *United States v. Lopez*, 514 U.S. 549,

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[2] American Land Foundation was known as Farm Credit Property Rights Foundation when the D.C. Circuit Court granted leave to file the *amicus* brief.

[3] *National Ass'n of Home Builders v. Babbitt*, 949 F.Supp 1 *aff'd* 130 F.3d 1041 (D.C. Cir. 1997) (hereinafter *"NAHB"*).

115 S.Ct. 624 (1995). As this Court is no doubt aware, the ESA in general, and the § 9 take provision in specific, have far-reaching effects on a landowner's ability to use and enjoy real property. This Court's examination of Congress' ESA authority, in light of *Lopez*, has tremendous implications in terms of both property rights and the limits of federal authority.

II. Summary of Argument

This is a very simple case. Under *Lopez's* three-part "substantial effects" analysis, the provision in question here – § 9(a)(1)(B) of the ESA and its prohibition against taking the Fly – cannot be upheld as a valid exercise of the commerce power. First, the regulated activity in this case is not in any sense a *commercial* activity, nor is it an integral part of a commercial regulatory regime. Second, the take provision does not contain a jurisdictional element. Third, the rationales offered in support of the take provision's application are both irrelevant to the proper inquiry and utterly without a logical stopping point.

To evade the conclusion *Lopez* compels, the courts below made several moves necessary to uphold the regulation. First, the scope of the substantial effects inquiry was radically expanded to encompass the effect of takes of *all endangered species*, rather than just the Fly at issue in this case. Second, the substantial effects inquiry was further expanded to take into account the attenuated and speculative future benefits which might derive from protection of endangered species. Third, the only nexus to interstate commerce was through an attenuated link to persons or products that are not the object of the regulation. Having thus radically expanded the scope of the

inquiry, the effects are then aggregated to demonstrate a substantial effect on interstate commerce.

Lopez forbids this type of expansive, attenuated and speculative substantial effects inquiry in cases such as this where the regulated activity is purely intrastate, non-commercial, and not an integral part of a commercial regulatory regime. Instead, the substantial effects inquiry must focus directly on the effect of the activity regulated. Because no reasonable person could assert that takes of the Fly assert a substantial effect on interstate commerce, the regulation of those takes is beyond Congress' Commerce Clause authority.

The lower courts – in this case and numerous others – have ignored *Lopez's* analysis of Congress' Commerce Clause authority. This case provides an excellent opportunity to revisit the Commerce Clause issue and remind the lower courts that *Lopez* is the law of the land.

III. Reasons For Granting Certiorari

A. Introduction

This Court's landmark decision in *Lopez* marked a watershed in modern Commerce Clause jurisprudence. Prior to *Lopez*, the U.S. Supreme Court had not once found that Congress had exceeded its Commerce Clause authority since the early New Deal in *A.L.A. Schecter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935). From the seminal case of *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) until *Lopez*, this Court was so exceedingly deferential to congressional claims of Commerce Clause authority that it made one noteworthy commentator wryly "wonder why anyone would make the mistake of calling it the Commerce Clause instead of the 'Hey, you-can-do-whatever-you-feel-like Clause.' "

NAHB, 130 F.3d at 1061. (Sentelle, J., dissenting) *citing* Judge Alex Kozinski, *Introduction to Volume 19*, 19 HARVARD J. L. PUB. POL. 1, 5 (1995).

Lopez, of course, brought that era of "galactic growth of the Clause's application" to an end. *NAHB*, 130 F.3d at 1061. (Sentelle, J., dissenting) Unfortunately, after a brief period during which a few district courts followed *Lopez's* three-part analysis, the circuit courts have largely ignored *Lopez* and soldiered on as if they were still in the heyday of the "Hey, you-can-do-whatever-you-feel-like Clause." *Lopez's* relegation to the dustbin of ignored opinions is illustrated by both the Circuit Court's opinion in this case and the opinions of lower courts in other Commerce Clause matters.

Perhaps the lower courts' failure to follow *Lopez* is the result of inertia from sixty years of unlimited Commerce Clause jurisprudence. Whatever the reason, the lower courts apparently need to be reminded that *Lopez* is the law. The genius of our Constitution is its unique federal system in which federal and state governments are dual sovereigns and the federal government is a government of limited, enumerated powers from which a general police power was intentionally withheld. "This constitutionally mandated division of authority 'was adopted by the Framers to ensure protection of our fundamental liberties.' " *Lopez*, 115 S.Ct. at 1626, *citing Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). "Just as the separation and independence of the coordinate branches of the federal government serves to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the states and the federal government will reduce the risk of tyranny and abuse from either front." *Lopez*, 115 S.Ct. at 1626.

B. The Circuit Court's main and concurring opinions below sharply conflict with this Court's decision in *United States v. Lopez.*

The Circuit Court's main opinion by Judge Wald and Judge Henderson's concurring opinion ignore the *Lopez* analysis in favor of an expansive analysis reminiscent of pre-*Lopez* cases.

1. Lopez's three-part "substantial effects" analysis was ignored by Judges Wald and Henderson.

Central to the *Lopez* opinion is the "substantial effects" framework for determining whether Congress possesses the authority under the Commerce Clause to regulate an activity. In striking down the Gun-Free School Zones Act, the Court focused on three key issues:

1. Whether the statute in question, by its terms, regulates commercial or economic activity?
2. Whether the statute in question contains a jurisdictional element which ensures that the regulated activity substantially affects interstate commerce?
3. Whether the rationales offered to support the statute offer any logical stopping point, thus withholding from Congress a general police power retained only by the States?

Lopez, 115 S.Ct. at 1630-34.

a. The Wald opinion concedes that the regulated activity is non-commercial, but then ignores the ramifications of that critical determination; the Henderson opinion simply ignores the issue.

Plainly the most important element of the *Lopez* substantial effects analysis is the inquiry into whether the

regulated activity is "commercial" or "non-commercial" and the consequences that flow from this determination. Just as plainly, the regulated activity in this case – takes of the Fly – is not in any sense commercial. Judge Wald concedes this point: "The ESA . . . regulate[s] activities – destruction of endangered species . . . – that are carried out entirely within a state and which are not themselves commercial in character," yet completely misses the crucial significance and consequences of this determination. *NAHB v. Babbitt*, 130 F.3d at 1055. Judge Henderson's opinion simply ignores the commercial/non-commercial issue.

Misreading both *Lopez* and *Wickard v. Filburn*, 317 U.S. 111 (1942),[4] Judge Wald's opinion asserts that "a class of activities can substantially affect interstate commerce regardless of whether the activity at issue – in this case the taking of endangered species – is commercial or non-commercial." But *Lopez* makes exactly the opposite point: If the regulated activity is neither commercial, nor an essential part of a larger regulation of economic activity, it "cannot . . . be sustained under our cases upholding regulations of activities that arise out of or are connected with a commercial transaction, which viewed in the aggregate substantially affect interstate commerce." *Lopez*, 115 S.Ct. at 1630-31.

By ignoring this crucial element of *Lopez* and expansively defining the class of activities as the effects of taking endangered species generally, rather than the Fly, and then aggregating those effects, Judge Wald sidesteps

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[4] The aggregation principle first announced in *Wickard* has been followed by later Supreme Court cases such as *Perez v. United States*, 402 U.S. 146 (1971).

the obviously ridiculous proposition that takes of the Fly have any effect whatsoever on interstate commerce, much less a substantial one. Both the "class of activities" and "aggregation" principles applied by Judge Wald ignore *Lopez* and are based on an improper application of *Wickard*.

Wickard's aggregation principle – which allows relatively trivial instances of local economic activity to be regulated because of their aggregate economic effect – does not apply to the take provision's application in this case for two reasons. First, the Fly is found in only one tiny location in the entire world. Thus, any conceivable effect takes of the Fly could have on interstate commerce cannot be aggregated together with the effect of takes of the Fly elsewhere because they simply do not exist. Unlike Mr. Filburn's wheat – which competed with wheat throughout the state, the nation, and ultimately, the world – the Fly cannot possibly compete with state, national or international populations because they do not exist.

The second and primary reason aggregation cannot be applied in this case is that the take provision does not regulate *commercial* activity. *Lopez*, 115 S.Ct. at 1630. In contrast to the AAA in *Wickard*, the regulated activity in this case is not part of an overarching price support mechanism, nor is it part of any other type of economic or commercial regulation. Although Congress inserted jurisdictional elements requiring a nexus with commerce in several of § 9's provisions, it failed to do so with the take provision. Congress' failure to create a commercial nexus in the take provision forecloses application of the aggregation principle. After *Lopez*, reliance on *Wickard* to

analyze the commerce power in a case involving a non-economic intrastate activity is simply not tenable.

Thus in an as-applied case involving intrastate, non-commercial activity, the regulated activity must have a substantial effect on interstate commerce, *without regard to aggregation*. The Ninth Circuit properly set forth this test:

> [W]here Congress seeks to regulate a purely intrastate noncommercial activity that has traditionally been subject to exclusive regulation by state or local government, and where the connection of the regulated activity as a whole to interstate commerce is neither readily apparent nor illuminated by express congressional findings, the government must satisfy the jurisdictional requirement by pointing to a "substantial" effect on or connection to interstate commerce.

U.S. v. Pappadopoulos, 64 F.3d 522, 527 (9th Cir. 1995).

Because the intrastate activity regulated here is non-commercial and is not part of a framework of commercial regulation, Judges Wald and Henderson erred in aggregating the effect of takes of all endangered species. This error was case dispositive, and is similar to the type of aggregation/class of activities errors that lower courts throughout the country have been making in Commerce Clause cases. *See* Section C.1, *infra*.

b. The Wald and Henderson opinions do not even acknowledge that the take provision lacks a jurisdictional element, much less assign the proper significance to its absence.

In addition to missing the import of the take provision's "non-commercial" nature, Judges Wald and Henderson completely ignored the second element of the

substantial effects analysis – whether the statute in question contains a jurisdictional element. A regulation containing a jurisdictional element insures, through case-by-case inquiry, that the regulated activity substantially affects interstate commerce. *Lopez*, 115 S.Ct. at 1631. Like § 922(q) in question in *Lopez*, § 9(a)(1)(B) of the ESA contains no jurisdictional element. It simply prohibits all takes of listed species without regard to interstate commerce. The absence of a jurisdictional nexus in § 9(a)(1)(B) stands in stark contrast not just to other statutes, but even to other provisions in § 9 of the ESA. *Compare with* § 9(a)(1)(E) (unlawful to "deliver, receive, carry, transport, or ship in *interstate or foreign commerce*, by any means whatsoever and in the course of a *commercial activity*" any listed fish or wildlife species) and § 9(a)(1)(F) (unlawful to "sell or offer for sale *in interstate or foreign commerce*" any listed fish or wildlife species) (emphasis added). *See also* §§ 9(a)(2)(C) & (D) (same prohibitions regarding plant species). Both the Wald and Henderson opinions completely ignore this important aspect of *Lopez'* substantial effects analysis.

c. The rationales offered in the Wald and Henderson opinions are either inapposite or place no logical stopping point on Congress' Commerce Clause authority.

The third element of *Lopez's* substantial effects analysis centers on the rationales offered in support of the regulation. Those rationales must provide some logical stopping point to congressional authority. Otherwise, Congress' Commerce Clause power would in effect become a general police power of the sort intentionally withheld from the Federal Government. *Lopez*, 115 S.Ct.

at 1632-34. One such rationale offered by Judge Wald, which is premised on "biodiversity," posits that the extinction of a species, and the resulting reduction in biodiversity, has a substantial effect on interstate commerce by diminishing a natural resource that later could be used for commercial purposes. *NAHB*, 130 F.3d at 1052-54.

This biodiversity rationale suffers from two fundamental problems. As Judges Henderson and Sentelle both observed, the requisite substantial effect is premised on the speculative, future benefits which may flow from a species. *Id.* at 1064. In other words, there is no substantial effect today, but there may be one tomorrow. This sort of speculative and attenuated argument is plainly inadequate under *Lopez*. The second problem with the biodiversity rationale is related to the aggregation problem discussed above – the scope of the inquiry is improperly expanded from the Fly to "biodiversity" generally, which necessarily includes a universe of additional activity that can be added together to show a substantial effect.

Judge Henderson offers a similarly attenuated rationale that places no real limits on the commerce power. Although Judge Henderson ostensibly rejects Judge Wald's biodiversity rationale, the rationale she advances is substantially similar. Noting the "interconnectedness" of ecosystems and species, Judge Henderson says that the extinction of one species affects others and their ecosystems. *Id.* at 1058-59. Thus, she concludes, protection of a purely intrastate species (such as the Fly) will therefore substantially affect interstate commerce. *Id.* The problem with this "rationale" is that it is not a rationale at all – it is a complete *non-sequitur*. The premise that the extinction of a species affects other species and their ecosystems

does not lead to the conclusion that there is a substantial effect on interstate commerce. To make this connection requires not a logical step, but rather a leap of faith, or as Judge Sentelle put it, "There is no showing, but only the rankest of speculation, that a reduction or even the complete destruction of the viability of the Delhi Sands Flower-loving Fly will in fact affect land and objects that are involved in interstate commerce." *NAHB*, 130 F.3d at 1065 (internal quotes omitted).

Distilled to its essence, Judge Henderson's second rationale is based on the notion that the ESA protects habitat from land development and that the ESA's regulation of commercial land development (through the take provision) has a substantial effect on interstate commerce. This formulation stands the relevant inquiry on its head. The question is not whether *regulating an activity* will substantially affect interstate commerce (obviously, the economic effects of regulating even an intrastate, non-commercial activity can be "substantial"), but whether *the regulated activity itself* (takes of the Fly) substantially affects interstate commerce. Just as obviously, the answer to the question – correctly posed – is "No."

Judge Wald's other rationale is fatally flawed as well. Judge Wald posits that Congress possesses the authority to regulate takes of endangered species through its power to regulate "destructive interstate competition." The problem with using that rationale here is that Congress' power in this regard is limited to regulating "destructive interstate competition" which relates to *commerce*. In areas outside of those powers expressly granted to the federal government, the States are sovereign. Not only does the Constitution not forbid "competition" between the several states, that is the very point of federalism and

the genius of our constitutional system. As it has often been observed, the States are the "laboratories of democracy" in which various solutions to problems can be tried to see which succeed and which fail.

d. When Congress enacts a regulation that intrudes into an area of traditional state authority, the regulation should be reviewed with heightened scrutiny because it upsets the federal-state balance.

Fundamental to the Federalism inherent in the Constitution's structure is the notion that the Federal sphere is limited to those areas of national concern enumerated in Article I, § 8. Those remaining powers not expressly ceded by the States to the Federal Government are reserved to the States. U.S. Const. amend. X. As James Madison wrote in Federalist 45, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." *Lopez*, 115 S.Ct. at 1626. One aspect of the Gun-Free School Zones Act the *Lopez* Court found most troubling was the act's federal intrusion into two areas of traditional State concern-criminal law and education. 115 S.Ct. at 1631. *See also*, 115 S.Ct. at 1638.

> Were the Federal Government to take over the regulation of entire areas of traditional State concern, areas having nothing to do with the regulation of commercial activities, the boundaries between the spheres of Federal and State authority would blur and political responsibility would become illusory.

Lopez, 115 S.Ct. at 1638 (Kennedy Concurrence).

When the Commerce Clause is used as a basis for intruding into areas of traditional state authority, the Court must apply greater scrutiny to the encroaching federal statute.

> The statute before us upsets the Federal balance to a degree that renders it an unconstitutional assertion of the commerce power, and our intervention is required. . . . *In a sense, any conduct in this interdependent world of ours has an ultimate commercial origin or consequence, but we have not yet said the commerce power may reach so far.* If Congress attempts that extension, then at least we must inquire whether the exercise of national power seeks to intrude upon an area of traditional state concern. An interference of these dimensions occurs here, for it is well established that education is a traditional concern of the State."

Id. at 1640. (Kennedy Concurrence) (emphasis added).

In this instance, the take provision deeply intrudes into two areas of traditional state authority: land use regulation and wildlife regulation. Unquestionably, those areas of law have traditionally been the province of the States and their localities. *See, e.g., Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta,* 458 U.S. 141, 153 (1982); *Baldwin v. Montana Fish and Game Comm'n,* 436 U.S. 371 (1978).

2. The take provision cannot be upheld as a regulation of the "channels of commerce."

In addition to upholding the take provision under the substantial effects test, Judge Wald also upheld the regulation under the "channels of commerce" category identified in *Lopez*. Judge Wald cited two bases. First, the take

prohibition is necessary to control the transport of endangered species and interstate commerce. Second, the take prohibition falls under Congress' authority to keep the channels of interstate commerce free of "immoral and injurious uses." *NAHB*, 130 F.3d at 1046-49. This is truly a tortured use of the "channels" category. As Judges Henderson and Sentelle noted, the authorities cited by Judge Wald all relate to commercially marketable goods such as guns, lumber and public accommodations. The Fly, of course, is a purely intrastate species and is not a commercially marketable good. Moreover, the regulated activity is not even remotely related to commercial sale or possession of Flies. It is simply illogical to assert the protection of the Flies' habitat is necessary to aid the prohibition of interstate sales of the Fly.

Judge Wald tries to fill the missing interstate commerce nexus by bootstrapping in the fact that the hospital (the construction of which apparently "harms" the Fly) "is presumably being constructed using materials and people from outside the state and which will attract employees, patients, and students from both inside and outside the state." *Id.* at 1048. Under Judge Wald's view, then, the mere fact that a person or object *has been* or *could be* in interstate commerce confers upon Congress the authority to regulate that person or object.

This absurdly expansive view plainly ignores the holding of *Lopez*. "Guns are both articles of commerce and articles that can be used to restrain commerce. Their possession is the consequence, either directly or indirectly, of commercial activity. In my judgment, Congress' power to regulate commerce in firearms includes the power to prohibit possession of guns at any location because of their potentially harmful use. . . . " *Lopez*, 115

S.Ct. at 1651 (Stevens, J., dissenting). *Lopez* rejected Justice Stevens' extraordinarily broad view of interstate commerce because it places no real limits on and provides no logical stopping point for Congress' commerce power. *Id.* at 1632-34. Obviously, guns – which are manufactured and sold commercially in interstate commerce – have a much closer nexus to interstate commerce than the Fly in question here. Since *Lopez* rejected the "guns as articles of commerce" theory, the same reasoning applies with even greater force to the *ferae naturae* in question here, which are neither manufactured in commerce nor sold in commerce, nor even owned. Similarly, guns – which were the actual *object of the regulation* in *Lopez* – have a much better claim for establishing a nexus with interstate commerce than do the people and construction materials (which are *not* the object of the regulation) employed by Judge Wald. Nevertheless, *Lopez* rejected this view. Wald's reasoning here is not faithful to *Lopez*.

C. Lower court decisions involving congressional regulation of intrastate, non-commercial activity routinely misapply the analysis in *Lopez*.

The Petitioners posit that the lower courts need guidance regarding *Lopez*. While *amici* certainly agree that there is substantial disagreement about the full meaning of *Lopez*, they respectfully suggest that *Lopez*'s analysis regarding intrastate, non-commercial activity is clear – it is simply not being followed by many of the lower courts. The errors in applying *Lopez's* reasoning to the facts of this case are hardly unique. The same type of errors are found throughout other Commerce Clause cases involving regulation of intrastate, non-commercial activity. These errors are in practically all instances case dispositive in favor of upholding the regulation. The primary

example of this is the still-prevalent use of "aggregation" and its relative, "the class of activities."

1. The "aggregation" and "class of activities" principles are routinely misapplied by lower courts in a case dispositive manner.

Just as in this case, lower courts routinely avoid evaluating the obviously minuscule – and often non-existent – effect of a regulated activity on interstate commerce by expanding the "class of activities" which is being analyzed for substantial effects and then "aggregating" the effects of this expanded class with all similar such instances throughout the country. *See, e.g., United States v. Olin Corp.*, 107 F.3d 1506 (11th Cir. 1997); *Brzonkala v. Virginia Polytechnic Institute*, 132 F.3d 949 (4th Cir. 1997). Obviously, any class of activities can eventually be defined broadly enough such that the aggregate effect on interstate commerce is substantial. *Lopez* foreclosed this type of aggregation abuse by allowing aggregation only when the regulated activity is commercial in nature.

The "aggregation" and "class of activities" principles are close relatives. Both are rules of law that the Court has fashioned to determine how narrowly or widely to view the effect of the regulated activity on interstate commerce. While aggregation and the class of activities rules are still viable, after *Lopez*, they cannot be applied universally. *Lopez* makes clear that aggregation is not appropriate and a narrower, more focused, inquiry is required when the regulated activity is intrastate and non-commercial in nature. This is particularly true when the regulated activity intrudes into an area of traditional state authority. *Lopez* makes this point forcefully when it states that *all activities* have ultimate commercial origins

or consequences, but that does not place those activities within reach of the commerce power. *Lopez*, 115 S.Ct. at 1633. *See also, id.*, at 1640 (Kennedy, J., concurring). Federalism and respect for our constitutional structure require this focused inquiry. Broader inquiries based on an expansive class of activities or inquiries that rely on attenuated effects on commerce, such as those advanced routinely advanced by the lower courts, "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Id.* at 1634.

Amici respectfully submit that once a court makes the decision to analyze a class of activities, rather than the actual effect of the regulated activity, and then aggregates those effects, the Commerce Clause element of the case is decided. This case provides the Court with an opportunity to re-emphasize *Lopez*'s central point: when the regulated activity is both intrastate and non-commercial, the court must look only to the regulated activities' effect on interstate commerce.

2. The lower courts are avoiding *Lopez's* substantial effects analysis by shoe-horning cases into the "channels of commerce" and "articles of commerce" categories.

Like the aggregation and class of activities problems discussed above, another trend in Commerce Clause jurisprudence in the lower courts threatens to undermine the limits that *Lopez* re-established on the commerce power. Faced with the rigorous three-part substantial effects analysis, many courts have resorted to shoe-horning cases that previously would have been analyzed

under the substantial effects test into categories one (channels of commerce) and two (articles of commerce). The reason seems clear. Although *Lopez* found that the regulation could not be upheld under any of the three broad categories of congressional regulation, the first two categories were "quickly disposed of" with little analysis, presumably because regulation of gun possession has no obvious connection to either category. *Lopez*, 115 S.Ct. at 1631. The third category – substantial effects – received the vast majority of the Court's attention and analysis. Seemingly to avoid this rigorous analysis, lower courts use tortured reasoning to uphold regulations under the categories one and two. *See, e.g., U.S. v. Kirk*, 70 F.3d 791, 797 (5th Cir. 1995), *aff'd* 105 F.3d 997 (5th Cir. 1997) (en banc), *cert. denied*, 118 S.Ct. 47.

This case is in many ways perfectly emblematic of that problem. The District Court's opinion upheld the take provision under the "articles of commerce" category on the theory that the Fly, and wildlife in general, are articles of commerce. The District Court fundamentally misperceived what the "articles in commerce" category allows Congress to regulate. As the name obviously implies, Congress can regulate objects or things that are actually *in the stream of commerce*, but Congress cannot regulate an item for eternity simply because it has once been an article in commerce. *Pappadopoulos*, 64 F.3d at 527. If that were true, Congress certainly could have regulated possession of the gun at issue in *Lopez*, as well as anything else that ever could be or has been in commerce, leaving nothing beyond the purview of congressional regulation.

Judge Wald, for her part, tersely rejected the articles of commerce category, merely stating that it is "clear"

that the take provision is "not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce." *NAHB*, 130 F.3d at 1046. Nevertheless, Wald's "channels of commerce" rationale for upholding the take provision falls prey to the very problem: it places no logical limits on the commerce power.

IV. Conclusion

No reasonable person can conclude that harming the Delhi Sands Flower-loving Fly has a substantial effect on interstate commerce. If the regulated activity in this case is upheld as a valid exercise of the commerce power, then there are no appreciable limits on Congress' Commerce Clause authority and the Court will have implicitly ceded to Congress what the Constitution intentionally withheld – a general police power. *Amici* respectfully urge this Court to grant *certiorari* and reverse the Circuit Court's decision upholding the application of the take regulation to the Fly.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF *AMICUS CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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24 pp

QUESTION PRESENTED

Whether the Commerce Clause empowers Congress to regulate a fly with no commercial value that is located exclusively within a limited area of a single state.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

ARGUMENT 2

I. The Court Should Grant The Petition To Clarify The Scope Of Commerce Clause Power To Regulate Intrastate Activity That Congress Classifies Together With Interstate Activity 3

II. The Court Should Grant The Petition To Resolve Whether The Commerce Clause Power Reaches Intrastate Activities With Remote or Speculative Connections To Interstate Commerce 6

III. The Court Should Grant The Petition To Clarify The Appropriate Degree Of Judicial Deference To Congressional Findings That Intrastate Activity Affects Interstate Commerce 9

IV. The Court Should Grant The Petition To Address Whether Prevention Of Immoral Acts Justifies Extending The Commerce Clause Power To Reach Intrastate Activity 11

V. The Court Should Grant The Petition To Clarify, After *Lopez*, The Relationship Between The Commerce Clause Power, The Powers Reserved To The States Under The Tenth Amendment, And The Fifth Amendment Power To Take Private Property 13

CONCLUSION 16

TABLE OF AUTHORITIES

CASES Page

Babbit v. SweetHome Chpt. of Communities for a Great Oregon, 515 U.S. 687 (1995)..... 1

Champion v. Ames, 188 U.S. 321 (1903)..... 13

Dolan v. City of Tigard, 512 U.S. 374 (1994) 13

First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987)..... 15

Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 11

Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981)..... 9

Hoke v. United States, 227 U.S. 308 (1913) 12

Maryland v. Wirtz, 392 U.S. 183 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985) 4

National Ass'n of Home Builders v. Babbitt, 949 F. Supp. 1 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.C. Cir. 1997) ..... *passim*

Perez v. United States, 402 U.S. 146 (1971)..... 4, 5, 6, 8

United States v. Darby, 312 U.S. 100 (1941)..... 11

TABLE OF AUTHORITIES continued

Page

United States v. Lopez, 514 U.S. 549 (1995) 2, 9

United States v. Riverside Bayview Homes, Inc., 474 U.S. 121 (1985) 1

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 13

Wickard v. Filburn, 317 U.S. 111 (1942) 6, 8

STATUTES AND RULES

16 U.S.C. § 1531(a) (1994) 10

16 U.S.C. § 1538(a)(1)(E)-(F) 15

50 C.F.R. §§ 17.11, 17.12 (1997) 5, 14

Sup. Ct. R. 37.2 1

Sup. Ct. R. 37.6 1

TABLE OF AUTHORITIES continued

Page

LEGISLATIVE MATERIALS

H.R. Rep. No. 93-412 (1973), *reprinted in* Senate Comm. on Env't and Public Works, 97th Cong. A Legislative History of the Endangered Species Act of 1973 (1982) 4, 10, 14

S. Rep. No. 93-307, *reprinted in* Senate Comm. on Env't and Public Works, 97th Cong. A Legislative History of the Endangered Species Act of 1973 (1982) 11

INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation.[1] The Chamber represents an underlying membership of more than three million businesses and organizations of every size, sector, and region. Ninety-six percent of the Chamber's members are businesses with less than 100 employees. The Chamber regularly advocates its members' views in court on issues of national concern to the business community. Chamber activities frequently involve the representation of the interests of its members in property rights and land use matters before the courts, the U.S. Congress, the executive branch, and independent regulatory agencies of the Federal government. The Chamber has participated as *amicus curiae* in a number of cases involving environmental issues, including *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995), and *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121 (1985).

The Chamber and its member companies are committed to the goals of the Endangered Species Act (the "ESA") and other federal environmental laws. To that end, and in

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* affirms that no counsel for either party authored any part of this brief and that no one other than *amicus curiae* provided any financial support for the preparation of this brief.

Pursuant to Supreme Court Rule 37.2, written consent to the filing of this brief has been obtained from counsel for petitioners and respondents, and the documents reflecting consent have been filed with the Clerk's office.

coordination with state and federal regulatory authorities, the Chamber's member companies have spent vast sums to comply with federal environmental laws and regulations, and have consulted on countless occasions with the federal agencies charged by Congress with implementing the ESA.

This case is significant not only because of its importance to the reach of the ESA, but also because the definition "interstate commerce," and the scope of Commerce Clause power over private land use and other intra-state activities, are vitally important issues to the business community.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interests of business in this case.

ARGUMENT

This case concerns the federal government's efforts to save the Delhi Sands Flower-Loving Fly from extinction. The petition for certiorari seeks Supreme Court review to save existing Commerce Clause doctrine from extinction, for if the Court of Appeals properly construed the scope of the Commerce Clause, there is virtually no limit to the powers of the federal government.

This case presents issues more far-reaching and complex than *United States v. Lopez*, 514 U.S. 549 (1995), in which the Court held that the Gun-Free School Zones Act exceeded Congressional authority under the Commerce Clause. In *Lopez*, the facts presented relatively straightforward questions of Commerce Clause authority, because the activity Congress sought to regulate—possession of a gun in a local school zone—"is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." 514 U.S. at 567. In contrast, this case involves federal regulation of an insect with no commercial value that is located exclusively within a limited area of a

single state, on the grounds that (1) Congress has assigned it to the same class as other species that have a substantial relationship to interstate commerce; (2) there have been minimal commercial transactions involving the insect in the past, and there may be some undefined commercial value for the insect in the future; (3) the insect is connected through the biological relationships of its ecosystem to other species with a relationship to interstate commerce; (4) Congress has made findings that support assertion of Commerce Clause power; and (5) moral issues bearing on extinction of species warrant consideration in determining the scope of the Commerce Clause.

At the end of the twentieth century, there is no question that rapidly changing notions of interstate commerce challenge traditional concepts of Commerce Clause authority. But the well-intentioned theories adopted by the Court of Appeals would eviscerate traditional learning that the Commerce Clause power requires an established relationship between regulated activity, interstate activity and commerce. The Chamber is concerned that these limitations on the federal power must be preserved, to protect the rights of private businesses and landowners from illegitimate federal interference. For the reasons set forth below, the Chamber respectfully submits that this case raises numerous significant issues that warrant Supreme Court review.

I. The Court Should Grant The Petition To Clarify The Scope Of Commerce Clause Power To Regulate Intrastate Activity That Congress Classifies Together With Interstate Activity

The Court should grant the petition to clarify the scope of Commerce Clause power to regulate intrastate activity that Congress classifies together with interstate activity. The Court has held that the Commerce Clause power extends to intrastate activity that is a trivial part of a class of activities

that bear a substantial relation to interstate commerce. "Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class." *Perez v. United States*, 402 U.S. 146, 154 (1971) (quoting *Maryland v. Wirtz*, 392 U.S. 183, 193 (1968), *overruled on other grounds*, *National League of Cities v. Usery*, 426 U.S. 833 (1976), *overruled by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985)). Similarly, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under the statute is of no consequence." *Maryland v. Wirtz*, 392 U.S. at 197 n.27. This case gives the Court an important opportunity—not present in *Lopez*—to refine existing doctrine and clarify the extent to which the Commerce Clause reaches intrastate activity that Congress assigns to a larger class of interstate activity.

Unlike *Lopez*, which involved regulation of matters that could *never* plausibly be construed as part of a class of activity that substantially affects interstate commerce, this case involves intrastate activity with a complex (though attenuated) relationship to interstate commerce. The Fly at issue in this case is confined to a small region within a single state, does not move across state lines (either on its own or because of commercial trading) and is not the subject of commercial transactions. But other endangered species do have an effect on interstate commerce, at least in part because they dwell in several states or migrate across state lines. Some endangered species also are the source of commercially valuable products. *See* H.R. REP. NO. 93-412 (1973), *reprinted in* SENATE COMM. ON ENV'T. AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 144-45 (1982). Judge Wald concluded that these *other* species' relationship to interstate commerce justifies extension of Commerce Clause power to the Fly:

> Because section 9(a)(1) of the ESA regulates a *class of activities* -- takings of endangered species -- that is within Congress' Commerce Clause power under both the first and third *Lopez* categories, application of section 9(a)(1) to the Fly is constitutional.

National Ass'n of Home Builders v Babbitt, 130 F.3d 1041. 1046 (D.C. Cir 1997) (emphasis added).

Judge Wald's analysis raises the critical question whether Commerce Clause power over intrastate activities extends far beyond the Court's existing precedents. *First*, her analysis presents the question whether Congress can invoke Commerce Clause power over intrastate activity when it comprises *more* than a trivial or "*de minimis*" part of the class of activity subject to regulation. *Cf. Perez*, 402 U.S. at 154 *supra*. Although some endangered species have been articles of interstate commerce in the past, there is no indication in the record that this is true of most species, nor does the government consider interstate commerce when it lists species as endangered. The Court should grant the petition, because the facts of this case present an unusual opportunity to determine whether Congress can regulate a class of activity involving a substantial amount of intrastate activity.

Second, Judge Wald's analysis presents the Court with the opportunity to clarify whether the Commerce Clause power can reach intrastate activity solely because Congress has classified it together with unrelated interstate activity. There is no nexus between the intrastate activity of the Fly and the interstate activities of other endangered species, yet Judge Wald held that "takings of endangered species" was a class of activity subject to regulation under the Commerce Clause, without regard to the interstate activity of any particular species. 130 F.3d at 1046. Surely the Commerce Clause does not allow Congress to define the scope of its own power by grouping activities beyond the scope of its constitutional authority together with activities involving interstate

commerce. This case presents the Court with an excellent opportunity to address the limitations the Commerce Clause places upon such Congressional actions.

II. The Court Should Grant The Petition To Resolve Whether The Commerce Clause Power Reaches Intrastate Activities With Remote or Speculative Connections To Interstate Commerce

The Court also should grant the petition to determine the extent to which the Commerce Clause power reaches intrastate activity with remote or speculative connections to interstate commerce. This Court's prior decisions have insisted upon a direct connection between intrastate activity and interstate activity. In *Wickard v. Filburn*, 317 U.S. 111 (1942), for example, the Court affirmed the constitutionality of regulations governing consumption of home-grown wheat, because regulation of that intrastate activity was a necessary element of the uniform nationwide regulation of wheat. Similarly, in *Perez*, 402 U.S. 146, the Court held that Congress had Commerce Clause power to criminalize intrastate extortionate credit transactions that financed organized crime because of the pervasively interstate and international character of organized crime and its direct financial effects upon the national economy. But in the present case, any association between the Fly and interstate commerce is extraordinarily attenuated and speculative. The case therefore presents the Court with the opportunity to reach beyond its prior decisions and further elucidate the scope of Commerce Clause power.

This case presents the Court with three separate issues that could clarify the extent to which Congress can use its Commerce Clause power to regulate activity with remote or speculative connections to interstate commerce. *First*, the case raises the extent to which *past* interstate commercial

transactions authorize Congress to regulate current activity that is exclusively intrastate. Although the Court of Appeals held otherwise, 130 F.3d at 1046, the District Court held that the Fly was "an article in interstate commerce," because there was historical "interstate commercial trading in the Fly" which "halted once it was declared 'endangered' by the Secretary." *National Ass'n of Home Builders v. Babbitt*, 949 F. Supp. 1, 8 & n.17 (D.D.C. 1996), *aff'd*, 130 F.3d 1041 (D.C. Cir. 1997). The District Court's holding derived from a record containing evidence of only two sales transactions, involving a total of five Flies, which yielded a total revenue of $10.00. Reply Brief for Appellants, at 4. The Court should grant the petition to clarify whether intrastate activity can be regulated because of prior related interstate commercial transactions, and if so, whether a history of merely trivial interstate transactions justifies assertion of Commerce Clause power by Congress.

Second, this case raises the question whether the speculative possibility of *future* interstate commercial transactions justifies assertion of Commerce Clause power over activity that currently is exclusively intrastate. Judge Wald's opinion recognizes that certain endangered species such as the Fly have no present commercial use, but nevertheless affirms Commerce Clause power over them because they may have *possible* commercial value in the *future*. Judge Wald explains that species "lost through extinction undoubtedly have economic uses that are, in some cases, as yet unknown," and that a species "whose worth is still unmeasured has what economists call an 'option value' -- the value of the possibility that a future discovery will make useful a species that is currently thought of as useless." 130 F.3d at 1053. Judge Wald therefore held that there was "a substantial effect on interstate commerce by depriving commercial actors of access to an important natural resource -- biodiversity." *Id.* at 1054. Judge Henderson properly concluded that under Judge Wald's analysis, it is "impossible

to ascertain" whether endangered species with no current commercial value will develop such value in the future. *Id.* at 1058. This case therefore presents the Court with an excellent opportunity to define the extent to which future interstate commercial activity justifies present assertion of Commerce Clause power, and if so, the extent to which such future activity may be wholly speculative.

Third, this case presents the Court with the opportunity to address the novel theory, espoused by Judge Henderson, that the Commerce Clause reaches intrastate activity connected to interstate activity exclusively through the biological relationships of an ecosystem. As noted above, this Court's prior decisions hold that the Commerce Clause power reaches intrastate activity that bears some *economic or commercial* relationship to interstate activity. *See Wickard*, 317 U.S. at 128 (discussing economic or commercial relationship of home-grown wheat to interstate wheat market); *Perez*, 402 U.S. at 154-57 (discussing economic or commercial relationship between intrastate extortionate credit transactions, organized crime, and the national economy). Judge Henderson's concurring opinion extends far beyond these precedents, holding that because of "the interconnectedness of species and ecosystems," "the extinction of one species affects others and their ecosystems and . . . the protection of a purely intrastate species . . . will therefore substantially affect land and objects that are involved in interstate commerce." 130 F.3d at 1059 (Henderson, J., concurring). In Judge Henderson's view, because Congress can regulate species that affect interstate commerce, it can regulate all other species that contribute to the seamless web of life.

The novel theory espoused by Judge Henderson raises profoundly important questions regarding the scope of Commerce Clause power. Given that human beings are a single species with its own biological relationships to an

ecosystem, does the Commerce Clause allow regulation of any human endeavor simply because *other* species are the subject of interstate commercial transactions? Does the fact that *some* human activity involves interstate commerce mean that *any* activity involving the same (human) species is subject to the Commerce Clause power? If Congress can legislate to prevent the killing of all endangered species that are part of a single ecosystem, why can it not protect children endangered by firearms through a statute like the one invalidated in *Lopez*? Does Congress have authority to regulate a matter such as biodiversity because of its manifest importance, even though it has a tenuous relationship to interstate commerce? If loss of a species has a *de minimis* effect on its ecosystem, should regulation be authorized? The Court should grant the petition to answer these important questions that arise from the Court of Appeals opinion.

III. The Court Should Grant The Petition To Clarify The Appropriate Degree Of Judicial Deference To Congressional Findings That Intrastate Activity Affects Interstate Commerce

This Court's decisions establish that "a court reviewing whether a particular exercise of congressional power is valid under the Commerce Clause" must "defer to a congressional finding that a regulated activity affects interstate commerce, if there is any rational basis for such a finding." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981). This case presents an important opportunity to clarify the appropriate degree of judicial deference to Congressional findings that intrastate activity affects interstate commerce and is therefore within the scope of Commerce Clause power. *Lopez* did not present this issue, because the statute challenged in that case had no Congressional findings addressing effects on interstate commerce. *Lopez*, 514 U.S. at 562. In contrast, the statutory

provision at issue in this case has Congressional findings that the Court of Appeals relied upon to distinguish the case from *Lopez* and to find an impact upon commerce. 130 F.3d at 1051. Because the Fly's relationship to interstate commerce is so tenuous, *see supra*, this case presents the Court with an excellent test case to clarify the extent to which Congressional findings can justify assertion of Commerce Clause power.

In particular, this case presents the question whether Congressional findings regarding interstate commerce fundamentally affect analysis of the issues set forth above in Sections I and II. *First*, the case allows this Court to address the extent to which Congressional findings can justify regulation of intrastate activity that Congress assigns to the same class as interstate activity (as described in Section I above). In the ESA's legislative history, Congress noted that commerce in some species hastened their extinction. H.R. REP. NO. 93-412, *supra*, at 144. The Court of Appeals used the ESA's legislative history regarding these other species (associated with interstate commerce) to justify assertion of Commerce Clause power over the Fly. 130 F.3d at 1050-51. This case would allow the Court to address the extent to which Congressional findings add a thumb to the scale to extend Commerce Clause power to activity that it otherwise might not reach.

Second, this case allows the Court to address the extent to which Congressional findings can "bootstrap" activity with speculative or tenuous connections to interstate commerce so that it comes within the scope of the Commerce Clause. Judge Wald's speculation about the future commercial value of some species (*see* Section II *supra*) parallels the ESA's House Report, which discusses "potential resources" which may hold the key to curing disease. H.R. REP. NO. 93-412, *supra*, at 143-44. Judge Henderson's ecosystem analysis (*see* Section II *supra*) parallels the ESA's Senate Report, which

cites "the need for biological diversity for scientific purposes" and states that "many of these animals perform vital biological services to maintain a 'balance of nature' within their environments." *See* S. REP. NO. 93-307, *reprinted in* SENATE COMM. ON ENV'T AND PUBLIC WORKS, 97TH CONG., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, at 301 (1982). Judge Sentelle noted in his dissent that "[a] creative and imaginative court can certainly speculate on the possibility that any object cited in any locality no matter how intrastate or isolated might some day have a medical, scientific, or economic value which could then propel it into interstate commerce." 130 F.3d at 1065 (Sentelle, J., dissenting). This Court should use this case as an occasion to clarify the extent to which courts can use limited and vague Congressional findings regarding interstate commerce to validate legislation under the Commerce Clause.

IV. The Court Should Grant The Petition To Address Whether Prevention Of Immoral Acts Justifies Extending The Commerce Clause Power To Reach Intrastate Activity

The Court also should grant the petition to address whether prevention of immoral acts justifies extending the Commerce Clause power to reach intrastate activity. Judge Wald's opinion justifies protection of endangered species under "Congress' authority to prevent the channels of interstate commerce from being used for immoral or injurious purposes." 130 F.3d at 1048. Relying on *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *United States v. Darby*, 312 U.S. 100 (1941), Judge Wald concludes that "like regulations preventing racial discrimination or labor exploitation, regulations preventing the taking of endangered species prohibit interstate actors from using the channels of interstate commerce to 'promot[e] or spread[] evil, whether of a physical, moral or economic nature.'" 130 F.3d at 1048 (citing *North American Co. v. SEC*, 327 U.S. 686, 705

(1946)). This case would allow the Court to clarify whether the doctrine invoked by Judge Wald applies to activity that reasonable people might agree is moral and which has a remote and speculative association with interstate commerce.

First, this case presents the Court with the opportunity to determine whether Congress can regulate endangered species on moral grounds at all. The suggestion that use of land by its owners (and in this case by the local government itself) in a manner consistent with local laws is akin to the moral issues presented in *Heart of Atlanta* and *Darby* is, to be charitable, novel. The owners of the land being subjected to habitat regulation in this case did not set out to eradicate the Fly; instead, the effects on the Fly were completely unintentional. *See* 130 F.3d at 1061 (Sentelle, J., dissenting). And evaluation of the "morality" underlying the activity sought to be regulated is further complicated by the countervailing interests in this case. Construction of a state-of-the-art hospital in an earthquake-prone region of Southern California could easily be viewed as a moral objective, and elevating the interests of the Fly over those of this humanitarian project could be regarded as immoral. This Court should grant the petition to clarify the scope of the "morality" doctrine invoked by Judge Wald.

Second, because the facts of this case involve a remote and speculative connection between the Fly and interstate commerce, *see supra*, this case presents the Court with an excellent opportunity to clarify the extent to which Commerce Clause doctrine requires a close nexus between immoral acts and interstate commerce. This Court never has held that Congress has a general power to regulate issues of "morality" unrelated to its enumerated constitutional powers. For example, prohibition of prostitution is typically a matter of state law, yet Congress has Commerce Clause power to forbid transportation of women in interstate commerce for immoral purposes in the Mann Act. *Hoke v. United States*,

227 U.S. 308 (1913). Similarly, gambling is typically controlled by state law, yet Congress has Commerce Clause power to prohibit the interstate transportation of lottery tickets. *Champion v. Ames*, 188 U.S. 321 (1903). Thus, although *Heart of Atlanta* and *Darby* both involved important moral issues—race discrimination against hotel guests in *Heart of Atlanta*, and the establishment of minimum wages and maximum hours for laborers in *Darby*—neither decision turned upon the *morality* of the activity being regulated, but rather upon its connection with interstate commerce. Granting the petition in this case would allow the Court to determine how close the nexus must be between immoral activity and interstate commerce for the Commerce Clause power to attach.

V. The Court Should Grant The Petition To Clarify, After *Lopez*, The Relationship Between The Commerce Clause Power, The Powers Reserved To The States Under The Tenth Amendment, And The Fifth Amendment Power To Take Private Property

The Court should grant the petition to clarify, after *Lopez*, the relationship between the Commerce Clause power, the powers reserved to the states under the Tenth Amendment, and the Fifth Amendment power to take private property. *First*, this case presents an excellent opportunity to address the federalism issues implicated by the Tenth Amendment, because there are significant state interests at stake. This Court has held that regulation of land use and private property relationships has historically been a core function of state and local governments. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926) (zoning regulation); *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994) (land use planning). The Fish and Wildlife Service's extraordinary restrictions on use of private property in this

case therefore implicate vital federalism concerns. Furthermore, the protection of endangered species involves some matters best administered by the states. When it enacted the ESA, Congress noted that protection of endangered species requires "coherent national and international policies," but it also recognized the importance of state efforts:

> [T]he states are far better equipped to handle the problems of day-to-day management and enforcement of laws and regulations for the protection of endangered species than is the Federal government. It is true, and indeed desirable, that there are more fish and game enforcement agents in the state system than there are in the Federal government.

H.R. REP. NO. 93-412, *supra*, at 146. Because the invocation of Commerce Clause power in this case involves regulation of matters of significant state concern, this case is worthy of Supreme Court review.

Second, on the other side of the federalism ledger, this case presents an excellent opportunity for the Court to address powers to regulate endangered species properly left to the federal government. Congress certainly has the authority to regulate interstate commercial transactions in endangered species that live within the United States.[2] But

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[2] Congress also has indirect authority to regulate the numerous animals and plants on the endangered species list with habitats *outside* the United States. *See* 50 C.F.R. §§ 17.11, 17.12. Although Congress does not have authority to forbid the destruction of such species as the Baluchistan bear of Iran and Pakistan, or the angulated tortoise of Madagascar (*see id.* at 103, 143) in their foreign country habitats, the federal government is able to protect those species indirectly by outlawing importation of such animals into the United States (as is done

(Footnote cont'd on next page)

the federal government also has indirect influence over intrastate endangered species properly regulated directly by the states. The federal government can encourage conservation efforts by state or local governments in the way that it achieves cooperation on other issues: by funding programs contingent upon the local governments' participation in conservation efforts. Granting the petition in this case would allow the Court to define the proper contours of federal government involvement in the regulation of endangered species.

Third, granting the petition also would allow the Court to consider the relationship of these important federalism issues to the federal government's Fifth Amendment "takings" power. It is settled law that the Fifth Amendment grants the federal government authority to take private lands through the power of eminent domain—a power that unquestionably reaches acquisitions of endangered species' habitats. *Cf. First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 315 (1987) (discussing Fifth Amendment eminent domain authority). If the federal government regulates endangered species by "taking" their habitats, the Fifth Amendment guarantees that the private landowner in possession of the habitat will receive just compensation. *See id.* On the other hand, if the federal government succeeds in regulating the same habitat through the ESA under the Commerce Clause, the resulting

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(Footnote cont'd from previous page.)

in the ESA, *see* 16 U.S.C. § 1538(a)(1)(E)-(F)), joining international treaties to promote conservation, and conditioning foreign aid or other favored international treatment upon a nation's compliance with American standards of endangered species protection.

substantial restrictions on land use, though crippling the landowner, may not be compensable takings.

In this case, therefore, the particular constitutional source of Congressional regulatory authority makes all the difference to the private landowners with property that happens to be habitat for an endangered species. The substantial real-world consequences of limiting the Commerce Clause power to its proper bounds therefore call out for Supreme Court review in this case.

CONCLUSION

For the foregoing reasons, Court should grant the petition for certiorari.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *ET AL.*,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF INTERIOR, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATION FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

Page

Interests of amici curiae 1

Statement of the case 3

Reasons for granting the petition 6

I. The court of appeals decided an important question of federal law that conflicts with this court's Commerce Clause jurisprudence 6

II. The court of appeals decision does violence to fundamental principles of federalism as articulated by this Court 14

A. Local land use activity 14

B. State regulation of wildlife on private and nonfederal lands 17

Conclusion 20

TABLE OF AUTHORITIES

Page(s)

Cases:

Askew v. American Waterways Operators, Inc., 411 U.S. 325 (1973) 17
Babbitt v. Sweet Home Chapter Communities for a Great Oregon, 515 U.S. 687 (1995) 2
Bennett v. Spear, 117 S. Ct. 1154 (1997) 2
Dolan v. City of Tigard, 512 U.S. 374 (1994) 2
Douglas v. Seacost Products, Inc., 431 U.S. 265 (1977) 17
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 15
Geer v. Connecticut, 161 U.S. 519 (1896) 17
Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964) 9
Hodel v. Indiana, 452 U.S. 314 (1981) 15
Hodel v. Virginia Surface Mining & Reclam. Ass'n, 452 U.S. 264 (1981) . . . . . *passim*
NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 7, 14
Perez v. United States, 402 U.S. 146 (1971) 9
South Dakota v. Dole, 483 U.S. 203 (1987) 19
Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 950 (1982) 15
United States v. Byrd, 609 F.2d 1204 (7th Cir. 1979) 11, 12, 13
United States v. Lopez, 514 U.S. 549 (1995) . . . . . *passim*
Utah v. Marsh, 740 F.2d 799 (10th Cir. 1984) 12, 13
Village of Belle Terre v. Borass, 416 U.S. 1 (1974) 15
Wickard v. Filburn, 317 U.S. 111 (1942) 8, 9

Constitution and Statutes:

U.S. Const., Art. I, sec. 8, cl. 3 (Commerce Clause) . *passim*
U.S. Const., Amend. X 14
16 U.S.C. § 1532(19) 3,4
16 U.S.C. § 1538(a)(1)(B) . . . . . *passim*
Endangered Species Preservation Act of 1966,
Pub. L. No 89-669, 80 Stat. 926 (repealed 1973) . . 18
Endangered Species Conservation Act of 1969,
Pub. L. No 91-135, 83 Stat. 275 18

Miscellaneous:

Sup. Ct. Rule 10(a) 6
Sup. Ct. Rule 10(c) 6
Sup. Ct. Rule 37.2(a) 1
Sup. Ct. Rule 37.6 2
Bean, *The Evolution of National Wildlife Law* (1983) . 18, 19
Halter and Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*,
10 Ecol. L. Q. 5 (1982) 17
Thomas A. Lund, *American Wildlife Law* (1980) 18, 20

IN THE
SUPREME COURT OF THE UNITED STATES
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National Association of Home Builders, et al.,
Petitioners,

v.

Bruce Babbitt, Secretary, United States
Department of Interior, et al.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF AMICI CURIAE THE WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF PETITIONERS

INTEREST OF AMICI CURIAE

Pursuant to Rule 37.2(a) of the Rules of this Court, the Washington Legal Foundation and the Allied Educational Foundation respectfully submit this amici curiae brief in support of the petitioners. Consent to the filing of this

brief has been granted by all the parties, and the consent letters have been lodged with the Clerk.[1]

The Washington Legal Foundation (WLF) is a national nonprofit public interest law and policy center based in Washington, D.C., with supporters nationwide, including many property owners who are subject to civil and criminal penalties of the federal Endangered Species Act.

WLF appeared as an amicus curiae in this case before the court of appeals because it raised serious questions regarding the limits of the power of Congress under the Commerce Clause to regulate traditional state and local land use activity and wildlife management. WLF has also appeared as amicus in numerous cases before this Court raising related questions regarding land use activity and the Endangered Species Act. *See Bennett v. Spear*, 117 S. Ct. 1154 (1997); *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, 515 U.S. 687 (1995); *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

The Allied Educational Foundation (AEF) is a nonprofit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, including law and public policy, and has appeared before this Court as amicus curiae in numerous cases along with WLF.

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[1] Pursuant to Rule 37.6, amici state that no counsel for a party in this case authored this brief in whole or in part, and no persons or entities other than the Washington Legal Foundation, its supporters, or counsel, contributed financially to the preparation or submission of this brief.

STATEMENT OF THE CASE

In the interests of judicial economy, amici adopt by reference the Statement of the Case as presented in the petition for writ of certiorari.

In brief, this case raises the important issue of whether there are any limits under the Commerce Clause to regulate private and local land use activities that may affect any federally listed endangered or threatened species (plants or wildlife, including insects), where the connection between that species and interstate commerce is non-existent, speculative, or at best, tenuous.

In this case, the U.S. Fish & Wildlife Service of the Department of Interior, restricted the petitioners from carrying out normal and reasonable local land use activities, including the building of a much needed hospital, because those activities would purportedly disturb the habitat of the Delhi Sands Flower-loving Fly (the "Fly"), a species found only in a small local area of two counties in Southern California. There was no showing that the Fly has or had any commercial value, such as a pollinator of crops sold in interstate commerce, or is likely to have such value in the foreseeable future; rather, its value has been essentially one of limited academic interest.

The federal government invoked its authority over this local land use planning and activity by citing the "take" provisions of the Endangered Species Act, 16 U.S.C. § 1538(a)(1)(B). Under the "take" provisions of the ESA, persons are subject to civil and criminal penalties if they "take" a species, that is, if they "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct." 16 U.S.C. §

1532(19). For example, a person who merely chases or "pursues" the Fly, but does not capture it or even intend to capture it, is subject to civil and criminal penalties under the ESA. Indeed, a person who "attempts" to chase one of the flies, can be prosecuted under this federal law.

In a sharply divided opinion, the court of appeals upheld this broad assertion of federal power over local land use activities under the Commerce Clause. Purporting to follow this Court's Commerce Clause jurisprudence, including *United States v. Lopez*, 514 U.S. 549 (1995), Circuit Judge Wald found that the "take" provision of the ESA as applied in this case is constitutional because it "substantially affects interstate commerce" in two ways: 1) "[i]n the aggregate. . . the extinction of species and the attendant decline in biodiversity will have a real and predictable effect on interstate commerce," Pet. App. 54a, and 2) the "taking" of the Fly "substantially affects interstate commerce because it [the "taking"] is the product of destructive interstate competition." *Id.* at 58a.

Judge Henderson concurred for somewhat different reasons, finding that while it cannot be said that the "protection of an endangered species has any effect on interstate commerce (much less a substantial one) * * * the loss of biodiversity itself has a substantial effect on our ecosystem, and likewise on interstate commerce." *Id.* at 68a. Judge Henderson further found habitat protection is within the power of Congress "*insofar as application* of section 9(a)(1) of ESA *here* acts to regulate commercial development of the land inhabited by the endangered species." *Id.* at 71a (emphasis added). Thus, Judge Henderson's *as applied* analysis would depend on the fortuity of the circumstances and nature of the "take". For example, "taking" a Fly in the form of chasing it for the

fun of it, or trampling or riding across the habitat area with destructive results, with no commercial activity at stake or involved in the activity, could not be regulated by Congress under this theory. Presumably, Judge Wald's "destructive interstate commerce" argument is also dependent on the fortuity of the nature of the cause of the habitat destruction -- here, the building of a hospital -- as opposed to "takes" involving non-commercial conduct.

Judge Sentelle vigorously dissented, finding no current or reasonably foreseeable connection between the Fly and interstate commerce. Pet. App. 72a. He further found that the nature of the conduct constituting the "taking" in this or any other case, is not inherently commercial. *Id.* at 84a.[2]

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[2] Judge Henderson disagreed with Judge Wald's conclusion that the Fly could be regulated on the grounds that the ESA regulates the use of "channels of interstate commerce." Pet. App. at 67a. Thus, only the "substantial affects interstate commerce" rationale received two votes below and is the focus of this brief.

Neither Judge Wald nor Judge Henderson found, nor could they, that the Fly could be regulated under the third and final area of the exercise of Congress's Commerce Clause power, namely, that the Fly was an instrumentality of commerce or article of commerce. While the district court upheld the "take" provision in this case in part by finding that Fly was an article of interstate commerce because five specimens of the Fly had once been sold in interstate commerce for $10.00, *see* Pet. App. at 18a, the court of appeals did not even mention this obviously trivial and constitutionally deficient connection between the Fly and interstate commerce.

REASONS FOR GRANTING THE PETITION

The petitioners and their supporting amicus Pacific Legal Foundation have emphasized in their respective briefs that the split in the circuits, as well as split between judges of the same circuit, as to the meaning of this Court's Commerce Clause decision in *United State v. Lopez* are compelling reasons to warrant this Court's review of the judgment below.

While amicus WLF wholeheartedly agrees that those reasons are sufficiently compelling as envisioned by Sup. Ct. Rule 10(a), and while we may cite additional conflicting circuit court opinions in that regard, we believe that review is also warranted under Sup. Ct. Rule 10(c), namely, that the court of appeals "decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court."

I. THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT CONFLICTS WITH THIS COURT'S COMMERCE CLAUSE JURISPRUDENCE

There can be no doubt that the question decided by the court below was an important question of federal law, namely, the constitutionality of the "take" provision of the Endangered Species Act. That provision affects literally millions of property owners, including state and local governments, and millions of acres of private and nonfederal land. The court of appeals' decision also conflicts with this Court's teachings on the Commerce Clause.

In *United States v. Lopez*, 514 U.S. 549 (1995), this Court recognized that its prior Commerce Clause jurisprudence had not been clear as to whether the regulated intrastate activity must "affect" or "substantially affect" interstate commerce in order to constitute a legitimate exercise of Congress' limited and enumerated power under the Commerce Clause. Chief Justice Rehnquist, speaking for the *Lopez* Court, concluded that "the proper test requires an analysis of whether the regulated activity 'substantially affects' interstate commerce." *Id.* at 559. In so doing, Chief Justice Rehnquist essentially adopted his concurring opinion in *Hodel v. Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 313 (1981) (Rehnquist, J., concurring) where he was careful to note the limits that the Commerce Clause places on the power of Congress:

> [I]t would be a mistake to conclude that Congress' power to regulate pursuant to the Commerce Clause is unlimited. Some activities may be so private or local in nature that they simply may not be *in* commerce. Nor is it sufficient that the person or activity reached have *some* nexus with interstate commerce. Our cases have consistently held that the regulated activity must *have* a *substantial* effect on interstate commerce. *E.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S., at 37, 57 S. Ct., at 624 (local activities may be regulated if they *have* a "close and substantial relation to interstate commerce"). Moreover, simply because Congress may conclude that a particular activity substantially *affects* interstate commerce does not necessarily make it so. * * * In short, unlike the reserved police powers of the States, which are plenary unless challenged as

> violating some specific provision of the Constitution, the connection with interstate commerce is itself a jurisdictional prerequisite for any substantive legislation by Congress under the Commerce Clause.

Id. at 310-11 (1981) (Rehnquist, J., concurring) (footnote omitted) (emphases in original).

Unlike the as-applied challenge presented in the case at bar, *Hodel* involved a facial challenge of the provisions of the Surface Mining Act that regulated a particular kind of local or intrastate land use -- surface coal mining -- which produces "a commodity that moves in interstate commerce." 452 U.S. at 283. Thus, as an initial observation, Judge Wald's characterization of *Hodel* as a case not involving an activity that is "commercial in character" is simply wrong. *See* Pet. App. 59a.

But even in sustaining Congress' power to regulate a clearly economic activity, then-Associate Justice Rehnquist was forced to opine: "there can be *no doubt* that Congress in regulating surface mining has stretched its authority [under the Commerce Clause] *to the 'nth degree.'*" *Id.* at 311 (emphasis added). The court below in the instant case ignored the clear guidance of *Lopez*, stretched the limited power of Congress under the Commerce Clause well beyond the "nth degree," and well beyond even *Wickard v. Fillburn*, 317 U.S. 111 (1942), which the *Lopez* Court characterized as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity." 514 U.S. at 560.

In this case, the court of appeals seemed to regard the regulations in *Wickard* and *Hodel* as being within the

heartland or core of Congress's Commerce Clause power, rather than being at its outermost edges, and moved on from there. Amici submit that the "biodiversity" theory of hypothetical interstate commerce is well beyond "the nth degree" of Congress's power, and pushes the Commerce Clause envelope into ethereal realms.

The court below erred by misapplying *Lopez*'s basic teachings as to when, whether, and how to aggregate the economic impact of the conduct that is subject to federal regulation. If aggregation is allowed, and only if the aggregate result demonstrates that there is a "substantial effect on interstate commerce," then the regulation would be upheld under the Commerce Clause. *Lopez* made clear that the prerequisite inquiry is whether the law regulated "intrastate *economic* activity." *Id.* at 559 (emphasis added) (citing to, *inter alia*, *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264; *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964); *Perez v. United States*, 402 U.S. 146 (1971) and even *Wickard v. Filburn*, 317 U.S. 111 (1942)). In striking down the gun possession law in *Lopez*, the Court said that since gun possession has nothing to do with commerce, and is not "an essential part of a larger regulation of *economic* activity," the law could not be sustained under the Court's cases "upholding regulation of [intrastate] activities that arise out of or are connected with a *commercial transaction*, which viewed in the aggregate, substantially affects interstate commerce.'

Thus, the impacts of the local activity may be aggregated for Commerce Clause purposes only where the regulated intrastate activity is an economic or commercial one, or, if it is not an economic activity, then aggregation is permissible only where the non-economic intrastate activity is "an essential part of a larger regulation of

economic activity." If neither of these two scenarios are presented, then no aggregation may occur; the regulated activity by itself must have a "substantial effect" on interstate commerce in order to be a legitimate exercise of congressional power under the Commerce Clause.

In this case, the "take" provisions are directed neither at economic activity nor non-economic activity constituting an essential part of a "larger regulation of economic activity" as Judge Sentelle properly observed. Consequently, the court of appeals erred by aggregating the economic effects of the taking of all endangered species, including wildlife, plants, and insects, in order to show a substantial effect on interstate commerce.

Amici submit that even if activity regulated by the "take" provision of the ESA is an economic or commercial activity -- or a non-economic activity that is an essential part of a larger regulation of economic activity -- the relevant class of activities is not the taking of all endangered wildlife as the lower court concluded, or all insects, but, at most, the taking of all Flies in the State of California.

What is clear is that in as-applied challenges such as this one, courts examine the interstate commerce effect that the particular regulated land use activity has on the protected resource. In *Hodel v. Virginia*, 452 U.S. 264 (1981), this Court stated that it "*agree[d] with the lower courts that have uniformly found* the power conferred by the Commerce Clause broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." 452 U.S. at 282 (citing cases, *id.* at n.21) (emphasis added). Judge Wald cited

only to a portion of this passage in *Hodel*; she conveniently failed to quote and consider the italicized language above referencing relevant lower court decisions in this area. *See* Pet. App. at 59a.

For example, in *United States v. Byrd*, 609 F.2d 1204 (7th Cir. 1979), one of the cases favorably cited in *Hodel*, the Seventh Circuit, in an as-applied challenge, examined whether Congress had authority under the Commerce Clause to regulate certain land use activity (the filling of wetlands adjacent to waterbodies) involving a natural resource that was wholly intrastate, namely, an intrastate lake.

The *Byrd* court made a factual finding that the destruction of those particular wetlands adjacent to Lake Wawasee in Indiana could likely have a "*substantial economic* effect on interstate commerce" because the lake currently attracts numerous interstate travelers for fishing and swimming. *Id.* at 1210 (emphasis added). Lake Wawasee is a "2,500 to 3,000 acre fresh water lake [approximately four square miles] used by interstate travelers and seasonal residents for water-related recreational purposes." *Id.* at 1205. "Destruction of all or most of the wetlands around Lake Wawasee...could significantly impair the attraction the lake holds for interstate travelers by degrading the water quality of the lake, thereby indirectly affecting the flow of interstate commerce." Thus, while the interstate commerce effects were indirect, they were nevertheless found to be "substantial."

Significantly, the *Byrd* court did *not* aggregate the economic effects of the regulated activity with respect to all waterbodies in the United States, or the smaller class of all

intrastate lakes in the United States, or even the still smaller class of all intrastate lakes in Indiana; rather, the court focused its analysis on the particular "endangered" intrastate lake in question.

In *Utah v. Marsh*, 740 F.2d 799 (10th Cir. 1984), the court was similarly faced with an as-applied Commerce Clause challenge to local land use activities that affected Lake Utah. The Tenth Circuit, noting *Hodel*'s language approving the analysis of *Byrd* and similar environmental cases, properly focused its analysis on the interstate commerce effect of the lake in question rather than a larger class of waterbodies. "Lake Utah is the largest freshwater lake in the State of Utah, with a surface area of approximately 150 square miles." *Id.* at 803. The Tenth Circuit found that the discharge of fill directly *into* Utah Lake "could well have a *substantial* economic effect on interstate commerce" because of its widespread use by interstate travelers and other interstate impacts.[3]

Based on this *site-specific* approach, it is clear that the interstate commerce effect of a "take" of the Fly is non-existent or trivial compared to the impact in the *Byrd* and *Marsh* cases. What is the economic effect on interstate commerce of the taking of a Fly or all the Flies in this case? If the "take" consists only of chasing after or

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[3] The court noted that "non-resident visitation at the lake averaged 6,919 persons per year" who came to hunt, fish, etc., and because waters from the Lake are used for irrigation of crops sold in interstate commerce, as well as to support "the State's most valuable warm water fishery which markets most of the catch out of state." *Id.* at 803.

"pursuing" one or even all of the adult Flies, no economic effect is apparent, let alone the requisite *substantial* one on interstate commerce.

But even if the "take" activity is such that the Flies are so harmed that the population is reduced further, or the Fly becomes extinct in a few years, the economic effect is, at best, minuscule. There is no known commercial value of the Fly. All we are told by Judge Wald is that "it is not beyond the *realm of possibility* that the genes of a wild pollinator species like the Fly *might* be inbred with the honeybee, which currently pollinates most major U.S. crops, to produce a pollinator that is more disease resistant." Pet. App. at 52a. Judge Wald tries to dress up this hypothetical and unknown use of the species in economic terms, referring to it as having an "option value," Pet. App. at 53a, and therefore, justifies the assertion of federal jurisdiction over the species because of its possible economic value. But the mere stating of this "realm of possibility" or "crystal ball" theory of the exercise of commerce clause power reveals at once that it is unprincipled and has no real limits.

Surely, the *Byrd* and *Marsh* courts, the former case cited with approval by this Court in *Hodel*, would not have found the intrastate lakes in those cases to have a "substantial effect on interstate commerce" if the evidence showed that only two or three interstate visitors came there over a period of several years. Yet under Judge Wald's novel "realm of possibility" theory of interstate commerce power, it was not even necessary to show that *anyone* ever visited these intrastate lakes because it was within the "realm of possibility" that somebody, someday, might do so. In short, the vague and open-ended "realm of possibility" standard by which courts are to judge the

permissible reach of Congress's exercise of its limited and enumerate Commerce Clause power is no standard at all.

II. THE COURT OF APPEALS DECISION DOES VIOLENCE TO FUNDAMENTAL PRINCIPLES OF FEDERALISM AS ARTICULATED BY THIS COURT

The decision of the court of appeals violates the fundamental principles of federalism embodied in the Tenth Amendment of the Constitution and applied in Commerce Clause challenges to federal regulation over matters that are primarily local in nature.

A. Local Land Use Activity

As this Court made clear in *United States v. Lopez*:

> the scope of the interstate commerce power 'must be considered in the light of our dual system of government and *may not be extended so as to embrace effects upon interstate commerce so indirect and remote* that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.'

514 U.S. at 557 (citing *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)) (emphasis added).

The "biodiversity/realm of possibility" rationale adopted by the court below is even more tenuous than the "indirect and remote" effect upon interstate commerce condemned in *Lopez*. Furthermore, the regulation of local land use activities and zoning has long been the province of

the States and their political subdivisions. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Village of Belle Terre v. Borass*, 416 U.S. 1, 13 (1974) (zoning "may indeed be the most essential function performed by local government") (Marshall, J., dissenting); *Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 950, 956 (1982) ("a State's power to regulate the use of water for the purpose of protecting the health of its citizens * * * is at the core of its police power").

When federal legislation such as the "take" provision of the ESA impinges on local land use, this Court has been especially sensitive to those concerns. For example, in *Hodel v. Indiana*, 452 U.S. 314 (1981), the Court addressed the impact of regulating strip mining, a commercial enterprise, on local land use:

> We also do not share the view of the District Court that the Surface Mining Act is a land-use measure *after the fashion of the zoning ordinances typically enacted by state and local governments*. The prime farmland and other provisions at issue in this case are concerned with regulating the conditions and effect of surface coal mining. Any restriction on land use that may be imposed by the Act are *temporary and incidental* to these primary purposes. The Act imposes no restriction on postreclamation use of mined lands."

Id. at 330 n.18 (emphasis added).

By sharp contrast, the "take" provision of the ESA as applied to the Fly is indeed designed after the fashion of land-use measures like zoning. The ESA essentially requires that the owner of the property keep some or all of it in its natural state as a habitat for a threatened or

endangered species for the indefinite future. This federal regulation thus constitutes a drastic example of confiscatory downzoning. Unlike the Surface Mining Act which *Hodel* found to impose "no restrictions on postreclamation use" of the land, the ESA imposes very severe restrictions as amply documented by the petitioners in this case, such as the problems encountered with the building of a county hospital, the prevention of housing development, interfering with highway use and traffic control, and similar land use restrictions, costing the local taxpayers millions of dollars all in the name of the Fly. Those millions of dollars could have been spent on health care, education, housing, and other pressing *human* problems in the community.

Furthermore, the *Hodel* Court repeatedly emphasized that the mining law regulates only "private individuals and businesses"; in this case, the "take" provisions regulate political subdivisions of the State of California, even including land owned by the State and local governments. Once an endangered or threatened species is listed, the designation of critical habitat under the ESA effectively imposes a federal zoning overlay onto local zoning maps. *Cf. Lopez* at 583 (Kennedy, J.) (1,000-foot gun-free buffer zones around schools makes it "difficult to navigate without infringing on those zones").

Clearly, the "take" provisions as applied to the Fly have had a dramatic and disruptive impact on local land use and planning, and thus, violate important principles of federalism.

B. State Regulation of Wildlife on Private and Nonfederal Lands

In addition to local land use planning and zoning, it is clear that the States have long asserted their authority over the regulation of wildlife. While the States do not literally "own" the wildlife within their borders, it is also "clear that the States have a substantial proprietary interest -- sometimes described as 'common ownership,' *Geer v. Connecticut*, 161 U.S. 519, 529 (1896) -- in the fish and game within their boundaries." *Douglas v. Seacost Products, Inc.*, 431 U.S. 265, 288-87 (1977) (Rehnquist, J., concurring in part and dissenting part). After surveying Supreme Court decisions on the subject up to 1960, then-Associate Justice Rehnquist concluded that "the cases are consistent in recognizing that the *retained interests of States* in such common resources as fish and game are of substantial legal moment, whether or not they rise to the level of a traditional property right." *Id.* (emphasis added).

States also had a common law right to seek recovery against private parties for polluting natural resources found within a state which has now been codified by legislation in most states. *See* Halter and Thomas, *Recovery of Damages by States for Fish and Wildlife Losses Caused by Pollution*, 10 Ecol. L. Q. 5 (1982); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973).

Against this substantial history of the States' consistent exercise of their traditional police powers regulating wildlife, the federal government began to legislate in this area only at the beginning of this century and in a very limited way when Congress enacted the Lacey Act.

> While the Lacey Act inaugurated significant federal legislation touching wildlife found within the states, by its terms the act *expressed great deference to the leadership of state law.* No federal crime was committed by properly labeled interstate shipment of any animal except those taken in violation of state law. As to species not then protected by state law, including various endangered species, the federal legislation posed no impediment whatever to taking. Through its identification of a violation of state law as an operative fact for the commission of a federal crime, federal law continued to give highest priority to those species most valued by state law, sporting wildlife.

Thomas A. Lund, *American Wildlife Law* 87 (1980) (emphasis added). It was not until relatively recently that Congress began to legislate in the area of endangered species protection. The Endangered Species Preservation Act of 1966, Pub. L. No 89-669, 80 Stat. 926 (repealed 1973), and the Endangered Species Conservation Act of 1969, Pub. L. No 91-135, 83 Stat. 275, focused on federal land acquisition authority for habitat and importation bans of endangered wildlife. There was no prohibition of the taking of endangered species, "preferring instead to leave [undisturbed] the *traditional authority of the states* to regulate the taking of resident wildlife." Bean, *The Evolution of National Wildlife Law* 330 (1983) (rev. ed.) (emphasis added).

The recognition by the federal government of the State's authority over wildlife within their borders abruptly changed in 1972 when the current version of the Endangered Species Act was passed with the current "take"

provision. For the first time in United States history, federal law would henceforth govern over State law as to the management and protection of certain wildlife on private and nonfederal land.

More significantly, the ESA not only regulates traditional wildlife, it also regulates plants and insects, as evidenced by the Fly in this case. But as one commentator recognized, "Because common law has never treated plants [or insects] as occupying the same conceptual status as wild animals, in terms of their susceptibility to private ownership, there may be a major constitutional impediment to prohibiting their taking on nonfederal lands." Bean, *supra*, at 345, n.127. Amici agree.

This case is not about the wisdom of protecting endangered species, but about the proper exercise of federal power to advance that interest. If the judgment of the court of appeals is reviewed and overturned, the Fly will not become extinct. There are numerous ways to protect the Fly in this case that are more respectful of the Constitution and federalism, such as a captive breeding program (which has been planned for the Fly), or the not uncommon practice of purchasing of the habitat either outright by the government or private conservation groups, or through the purchase of conservation easements.

Congress is also free to encourage the States to protect endangered local species such as the Fly by withholding certain federal funds if the States fail to protect the species. This practice is constitutionally permissible so long as the withholding of funds does not become so coercive as to result in compulsion. *See South Dakota v. Dole*, 483 U.S. 203 (1987).

If the judgment below is left unreviewed, there would be no limit to Congress's power over wildlife found only within the borders of a State. For example, the federal government could easily determine what the deer hunting season should be in Maine or Virginia; indeed, Congress could regulate or ban the hunting or fishing of any local species altogether, endangered or not.

CONCLUSION

As one author candidly acknowledged in a study funded by the National Wildlife Federation: "Since ecologists contend that all forms of life are interdependent, this theory [of indirect connection of wildlife to interstate commerce] might at its logical extreme support federal legislation with regard to everything that is alive." Lund, *American Wildlife Law* 50 (1980). This is precisely the "biodiversity/realm of possibility" theory espoused by the court below.

This Court in *Lopez* made it clear that its decision, at a minimum, amounted to a firebreak that was to check Congress's eagerness to disregard its limited power under the Commerce Clause when it federalizes and criminalizes any and all conduct for politically expedient or even noble reasons. The court of appeals decision, if allowed to stand, would make the *Lopez* decision appear to be only a quaint and quirky decision that is easily circumvented and does not impose any real limits on the exercise of federal power over traditionally local matters and intrastate activity.

For the foregoing reasons and those stated by the petitioners, the petition for writ of certiorari should be granted.

Respectfully submitted.

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In The
Supreme Court of the United States
October Term, 1997

NATIONAL ASSOCIATION OF HOME BUILDERS, *et al.*,

Petitioners,

vs.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF *AMICI CURIAE* OF DEFENDERS OF PROPERTY RIGHTS* IN SUPPORT OF THE PETITIONER

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31pp

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BRIEF *AMICI CURIAE* OF

AMERICAN ASSOCIATION FOR SMALL PROPERTY OWNERSHIP
AMERICAN HOMEOWNERS FOUNDATION
AMERICAN LOGGERS SOLIDARITY
CITIZENS FOR CONSTITUTIONAL PROPERTY RIGHTS
COMMITTEE FOR A CONSTRUCTIVE TOMORROW
DAVIS MOUNTAINS TRANS-PECOS HERITAGE ASSOCIATION
EAST TEXAS HERITAGE ASSOCIATION
FRONTIERS OF FREEDOM
HILL COUNTRY HERITAGE ASSOCIATION
MAINE CONSERVATION RIGHTS INSTITUTE
NATIONAL CENTER FOR POLICY ANALYSIS
NORTHWEST LEGAL FOUNDATION
PEOPLE FOR THE WEST! ACCORD CHAPTER
RIVERSIDE COUNTY FARM BUREAU
STOP TAKING OUR PROPERTY and
TRANS TEXAS HERITAGE ASSOCIATION
TEXAS WILDLIFE ASSOCIATION

QUESTION PRESENTED FOR REVIEW

Does the Commerce Clause permit the federal government to regulate land-use activities pursuant to the Endangered Species Act in order to protect the habitat of a species located solely within the borders of a single state?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW.....i

TABLE OF AUTHORITIES.....iii

IDENTITY AND INTERESTS OF AMICI CURIAE 1

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 8

REASONS WHY THE PETITION SHOULD BE GRANTED.....11

I. THIS COURT NEEDS TO CLARIFY WHETHER CONGRESS HAS THE POWER PURSUANT TO THE COMMERCE CLAUSE AND THE TENTH AMENDMENT TO REGULATE LOCAL LAND USE DECISIONS 11

II. THIS COURT NEEDS TO ADDRESS THE ISSUE OF HOW THE PROVISIONS OF SECTION 9 OF THE ESA MAY BE APPLIED IN A WAY THAT PROTECTS THE FIFTH AMENDMENT RIGHTS OF PRIVATE LANDOWNERS.....16

CONCLUSION.....19

APPENDIX.....1a

TABLE OF AUTHORITIES

Cases

Dolan v. City of Tigard, 512 U.S. 374 (1994) 11, 18

Loretto v. TelePrompter Manhattan CATV Corp., 458 U.S. 419 (1982) 17

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) 17-18

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 7, 9-10

New York v. United States, 505 U.S. 144 (1992) 9

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) 8

Palilla v. Hawaii Dep't of Land and Natural Resources, 639 F.2d 495 (9th Cir. 1981) 12

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 11

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 18

United States v. General Motors Corp., 323 U.S. 373 (1945) .. 17

United States v. Lopez, 514 U.S. 549 (1995) 8, 11-12

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 11

TABLE OF AUTHORITIES, cont'd

Cases

Warth v. Seldin, 422 U.S. 490 (1975) 12

Other Authorities

National Biological Survey: Hearings Before The Joint House Comm., 103rd Cong., 2d Sess. (1993) 16

Rules

50 C.F.R. § 17.3 (1994) 14

Constitutional Provisions

U.S. CONST. amend. V 17

U.S. CONST. amend. X 8-9

Pursuant to Rule 37.3 of the Rules of this Court, *amici curiae* submit this brief in support of the Petitioner.[1]

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Defenders of Property Rights is the only national legal defense foundation devoted exclusively to protecting private property rights. Defenders was founded as a non-profit, public interest firm in 1991 in recognition that property rights are today under siege by excessive government regulations and actions that take private property for public use without just compensation and defeat the system of limited government inherent in the Commerce Clause and the Tenth Amendment. Defenders devotes a significant portion of its resources to constitutional litigation and has participated in *Lucas v. South Carolina Coastal Council*, *Dolan v. City of Tigard*, *Babbitt v. Sweet Home Chapter Communities for a Great Oregon*, *Bennett v. Spear*, *Suitum v. Tahoe Regional Planning Agency* and *Boerne v. Flores* when they were before this Court.

American Association for Small Property Ownership (Front Royal, VA) represents the interests of landlords, property owners and real estate investors. Its goal is to restore common sense and equity to federal, state and local regulations, tax and

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[1] No counsel for either party authored this brief *amici curiae*, either in whole or in part. Furthermore, no persons other than *amici curiae* (their

liability and other laws that unconstitutionally impinge on the right of landlords, property owners and real estate investors to build wealth and success by the beneficial and productive use of property.

American Homeowners Foundation (Arlington, VA) is an independent education and research organization serving the nation's sixty-five million homeowners and millions of future homeowners. AHF is dedicated to making home ownership possible for non-owners, helping homeowners in need, protecting home values and ownership tax incentives, and helping people make the most well-informed decision when purchasing a home.

American Loggers Solidarity (Forks, WA) is a broad-based organization comprised of individuals, small businesses, corporations, and elected officials at the city, county, and state levels in seven states. ALS believes in the sanctity of individual rights as provided in the United States Constitution, and recognizes that individual rights are the cornerstone of democracy and must be protected by elected officials, bureaucracies, and the judicial system.

Citizens for Constitutional Property Rights, Inc. (Crestview, FL) is a statewide organization whose missions is to secure private property guarantees provided in the Bill of Rights.

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members or counsel) contributed financially to the preparation of this

CCPR engages in public advocacy projects that foster an awareness of governmental programs that violate the United States Constitution by eroding private property rights.

Committee for a Constructive Tomorrow (Washington, D.C.) is a non-profit public interest organization founded in 1985 that promotes free-market and safe technological solutions to current consumer and environmental concerns.

Davis Mountains Trans-Pecos Heritage Association (Alpine, TX) is an association of Texas citizens formed in response to the abridgment of private property rights in the Davis Mountains and Trans-Pecos areas. The Association supports private property rights protection through research, public education, and other activities. Its mission embraces conservation of natural resources in conjunction with respect for private property rights, which underlie all other individual liberties.

East Texas Heritage Association (Pecan Gap, TX) is an association of landowners in northeast Texas dedicated to the preservation of private property rights. ETHA has actively challenged the erosion of private property rights in northeast Texas resulting from public trails being constructed on private property under the authority of the Rails To Trails Act.

Frontiers of Freedom (Arlington, VA) is a grassroots membership organization founded to promote the basic ideas of

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brief.

the Founding Fathers as articulated in the Constitution to ensure the maximum amount of freedom for every American.

Hill Country Heritage Association (London, TX) was formed in response to the proposed dedication of twelve Texas counties as habitat for an endangered species. Members of HCHA embrace the concept and practice of the conservation of natural resources in conjunction with respect for individual property rights.

Maine Conservation Rights Institute (Lubec, ME) is a research and educational institute serving the land-owning public of Maine. MECRI keeps landowners informed of government policy, including proposed and existing programs that undermine private property rights. MECRI encourages private conservation and wise use land policies. MECRI is also the sponsor of the annual Conservation Rights Congress, which addresses contemporary land rights issues.

National Center for Policy Analysis (Dallas, TX) was established in 1983 in an effort to provide policy makers with timely, detailed and accurate information about the impact of proposed policies legislation. NCPA seeks to promote private alternatives to government regulation and control, solving problems by relying on the strengths of the competitive, entrepreneurial private sector.

Northwest Legal Foundation (Minot, ND) is dedicated to promoting proper and responsible exercise of government

authority and safeguarding individual rights and freedoms guaranteed by our Federal and State Constitutions. The Foundation's goal is to be a major force in the legal arena to champion the causes of the private enterprise system, economic and individual freedoms, limited government and private property rights.

People for the WEST! ACCORD Chapter (Scottsdale, AZ) is a grassroots organization that was created to support western communities against the overreaching hand of government. Its membership believes that people who own and depend on the land make better stewards of the environment, and that mankind has the ability to solve any legitimate environmental problems through sound scientific means.

Riverside County (California) Farm Bureau (Murrieta, CA) exists to represent, protect and advance the social, economic and educational interests of the farmers of Riverside County, California. RCFB works for the solution of the problems of the farm, the farm home and the rural community, by use of the recognized advantages of organized action, to the end that those engaged in the various branches of agriculture may have opportunity for happiness and prosperity in their chosen work.

STOP Taking Our Property (Chesterton, IN) is comprised of 300 farm families who live along the Salt Creek and Little Calumet Rivers in Porter County, Indiana. These families have been adversely affected for years by capricious applications of

federal environmental regulations. Members of STOP believe that government should be bound by constitutional protections of private property when it enforces regulations pertaining to land use.

Trans Texas Heritage Association (Alpine, TX) is a statewide organization dedicated to the protection of landowner rights. Its members collectively own over fifteen million acres of land in Texas and other states. Members of TTHA believe that private property rights are the cornerstone of the freedoms and liberties protected by the Constitution, and that environmental regulations and zoning restrictions often unreasonably limit private property ownership and development.

STATEMENT OF THE CASE

The issue before the Court in this case is whether the court below erred in holding that the U.S. Fish and Wildlife Service has authority, pursuant to the Commerce Clause, to apply Section 9 of the Endangered Species Act (ESA) to the Delhi Sands Flower-loving Fly ("the Fly"), a species found solely within the borders of the state of California and not the subject of any commercial activity.

More fundamentally, however, this case is about whether the federal government has the power to control

innumerable local land-use decisions under the guise of protecting endangered species. In the case at bar, for example, the FWS, acting in effect as a federal "zoning board," became intimately involved in the siting and layout of a local hospital. Judge Sentelle in his dissenting opinion in the court below pointed out the intrusive nature of the application of the ESA in this case:

> Local land-use planning, including the authority to balance environmental concerns with development in a way to best serve citizens' interests, has been disrupted; the financial health of the local governments has been impacted; a local enterprise zone has been threatened; and private land development has been impeded.

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1060 (D.C. Cir. 1997 (J. Sentelle, dissenting).

Such federal intrusion in the land use process plainly upsets the balance of federal and state power envisioned by the Framers. Therefore, it is vital that the Court accept this case for review in order to determine whether such expansive application of Section 9 comports with the limitations on federal power set forth in the Commerce Clause.

SUMMARY OF ARGUMENT

In the Court's recent landmark decision in *United States v. Lopez*, 514 U.S. 549 (1995), the Court sets out the Framers' rationale for including the Commerce Clause, Article I § 8, within the Constitution:

> We start with first principles. The Constitution creates a Federal Government of enumerated powers . . . As James Madison wrote, "[t]he powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." . . . ". . . a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front."

Id. at 552 (citations omitted). Moreover, even in *NLRB v. Jones & Laughlin Steel, Corp.*, the decision that initiated the expansion of Congress' Commerce Clause power during the New Deal, the Court held that federal power "may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them . . . would effectually obliterate the distinction between what is national and what is local and create a completely centralized government. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937).

In addition to the provisions of the Commerce Clause, the Constitution explicitly sets forth the restriction in the Tenth

Amendment that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. In *New York v. United States*, 505 U.S. 144 (1992), this Court recognized that "[s]tates are not mere political subdivisions of the United States," rather, they retain "a residuary and inviolable sovereignty . . . reserved explicitly to the States by the Tenth Amendment." *Id.* at 188. Moreover, this Court has also held that the Tenth Amendment also provides for a balance between the federal and state governments:

> Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and Federal Government will reduce the risk of tyranny and abuse from either front.

Id. at 181.

As set forth below, the effect of ESA Section 9, as applied here, is to create a 'completely centralized' federal system of land use regulation that preempts state and local regulation and upsets the delicate balance between federal and state sovereignty created by the Commerce Clause and the Tenth Amendment. Indeed, if Section 9 were to be construed (as the court below does) as a tool for managing entire 'ecosystems,'

National Ass'n of Home Builders v. Babbitt, 130 F.3d 1041, 1058-59 (D.C. Cir. 1997) (J. Henderson, concurring), it is conceivable that every single square inch of land in the United States could be regulated by the federal government pursuant to the ESA because under the ecosystem theory,

> [e]very species is part of an ecosystem, an expert specialist of its kind, tested relentlessly as it spreads its influence through the food web. To remove it is to entrain changes in other species, raising the populations of some, reducing or even extinguishing others, risking a downward spiral of a larger assemblage.

Id. at 1053 (quoting Edward O. Wilson, *The Diversity of Life* 308 (1992)). If such a theory were taken to its logical end, any action that affects any species, endangered or not, could conceivably affect the 'ecosystems' in which endangered or threatened species exist. As such, the application of the ESA urged by respondent and the court below provides no boundary on the power of the government to regulate the most minute details of everyday land use decisions having at most distant and tangential effects on listed species. The effect of this regulation would be overwhelming federal interference with local land use planning and regulation. Accordingly, it is critical that this Court address these constitutional concerns and provide

guidance for lower courts as to the permissible reach of federal endangered species regulation.

REASONS WHY THE PETITION SHOULD BE GRANTED

I. THIS COURT NEEDS TO CLARIFY WHETHER CONGRESS HAS THE POWER PURSUANT TO THE COMMERCE CLAUSE AND THE TENTH AMENDMENT TO REGULATE LOCAL LAND USE DECISIONS.

Historically, state and local governments in this country have held the primary responsibility to enact, maintain, and enforce laws regulating the use of private land. This Court has repeatedly held that the Constitution supports this tradition of state control of land use law pursuant to the police power. *See, e.g., Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926)(holding that zoning regulation falls within the police power); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 (1978)(historic preservation ordinance "substantially related to the promotion of the general welfare. . ."); *Dolan v. City of Tigard*, 512 U.S. 374, 384-85 (1994)("the authority of state and local governments to engage in land use planning has been sustained against constitutional challenge . . .").

This Court has held that the general police power is exclusively reserved to the states and protected by the Constitution. *United States v. Lopez*, 514 U.S. 549, 567 (1995) (declining to expand Commerce Clause authority into federal police power). Zoning and land use planning, as a manifestation of the police power, have been recognized by this Court as "peculiarly within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 509 n.18 (1975).

Despite the primacy of the states in the regulation of land use, the present application of the ESA Section 9 "take" prohibition to situations involving "habitat modification" has produced a shift in the power to regulate land use from state and local governments to the U.S. Fish and Wildlife Service.

In attempting to enforce the mandates of ESA Section 9 regulating the "taking" of endangered and threatened species, FWS has placed restrictions on the use of non-federal land across the country. In particular, FWS has prohibited landowners from making normal, otherwise legal, use of their property even when that use is not directed against endangered or threatened species simply because the land in question might be habitat for a species listed under the ESA. *See Palilla v. Hawaii Dep't of Land and Natural Resources*, 639 F.2d 495 (9th Cir. 1981) (holding that maintaining sheep and goats on critical habitat for Palilla bird constituted a "take" under Section 9). Moreover, FWS does not limit its oversight to land that contains

protected "habitat" for endangered species, but also 'potential' habitat.[2]

The agency also relies on its regulatory interpretation of Section 9 to restrict the use of land not considered protected habitat if it believes that use of that land might *affect* protected habitat. For example, the FWS has used the broad language of the regulations implementing Section 9 to prevent the development of land that would contribute to "urbanization" which, while not directly affecting any specific animal, would reduce the habitat adjacent to places where the golden-cheeked warbler, an endangered species found primarily in Texas, has been sighted:

> We previously indicated . . . that development of houses along Foxtree Cove could require authorization under the Endangered Species Act. This position was based upon the identification of golden-cheeked warblers in the canyon on both sides of Foxtree Cove and that current

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[2] In a letter to Texas landowner Marge Krueger, a FWS official stated that "[w]e believe this property would be *suitable* habitat for the federally listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by [sic] Endangered Species Act. . ." Letter from Sam D. Hamilton, State Administrator, to Marge Krueger, undated (emphasis supplied). The text of the document is appended as Exhibit A. A copy of the original document is lodged with the Clerk of the Court under separate cover.

> biological information indicates that urbanization adversely impacts use of an area by this species.[3]

Development of the above property was never shown to actually "kill or injure" wildlife under the terms of the regulations implementing Section 9, except under an elastic definition of those terms that equates encroaching urbanization generally with killing or injuring endangered species. Such a definition is so broad as to be both all encompassing and meaningless.

Additionally, FWS uses the ESA as justification for regulating a tremendous range of land uses. FWS has provided in its regulatory interpretation of Section 9 no need to prove that a land use actually results in physical injury to an individual member of a species. According to the FWS, the 'modification' of habitat is itself enough to demonstrate that a "take" has occurred. The regulatory interpretation assumes that an endangered species is taken merely when an activity "significantly impair[s] essential behavioral patterns." 50 C.F.R. § 17.3 (1994). The agency, however, has established no clear standard for what constitutes a 'significant impairment' and has interpreted the rule broadly to encompass everyday activities occurring on private property. For example, a Florida rancher received a letter from the FWS demanding the cessation of

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[3] Letter from Sam D. Hamilton, State Administrator, to Lee Sherrod, dated July 9, 1992. The text of the document is appended as Exhibit B.

certain activities that had the "potential to impact Florida scrub jays."[4] There was no confirmation that scrub jays actually occupied or had ever occupied the property, but the rancher was prohibited from clearing land to plant some blueberry bushes for his personal, non-commercial use. The FWS stated:

> This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc. . . . This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

Merriman letter.

A landowner who would face an enforcement action pursuant to Section 9 for using their property in a manner in which FWS disapproves may only escape liability by seeking an "incidental take" permit from FWS under Section 10(a). Such permits are difficult for individual landowners to obtain and often very expensive. Moreover, even where a Section 10(a) permit is issued, the permit may restrict land use more severely

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A copy of the original document is lodged with the Clerk of the Court under separate cover.

[4] Letter from David J. Wesley, FWS Field Supervisor, to Curtis W. Merriman, dated May 13, 1993 ("Merriman letter"). The text of the document is appended as Exhibit C. A copy of the original document is lodged with the Clerk of the Court under separate cover.

than state and local land use regulation would otherwise provide for.

II. THIS COURT NEEDS TO ADDRESS THE ISSUE OF HOW THE PROVISIONS OF SECTION 9 OF THE ESA MAY BE APPLIED IN A WAY THAT PROTECTS THE FIFTH AMENDMENT RIGHTS OF PRIVATE LANDOWNERS.

According to Secretary of the Interior Babbitt, "The Endangered Species Act is an extraordinary piece of legislation because it allows the Federal Government to preserve, maintain, and foster the recovery of endangered species wherever they occur, without regard to geography, location, or land ownership." *National Biological Survey: Hearings Before The Joint House Comm.*, 103rd Cong., 2d Sess. (1993). Due to the broad agency interpretation of what constitutes a "take" pursuant to Section 9, including modification of a species habitat, coupled with the severe civil and criminal sanctions for any violations of the Act, many reasonable and productive uses of private property are being substantially curtailed or terminated altogether by the Act. For example, in order to avoid habitat modification which could "take" a species protected under the Act, landowners have been prohibited from crossing dry creeks in vehicles, cutting trees, clearing brush, using pesticides, planting crops, building homes, grazing livestock, and protecting

livestock from predators. In that way, the Act has in many instances deprived landowners of the only economic uses they can make of their properties—uses which are productive and which contribute to local, regional, and national economies and welfare.

Such cavalier destruction of property rights is in clear derogation of the constitutional mandate that "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Indeed, it is doubtful that the regulatory excesses currently occurring under the ESA would be possible if the government were in fact complying with its constitutional duty to pay for the private property that it takes.

The right to use land is protected by the Fifth Amendment's due process and takings clauses. This Court has explicitly held that the property rights protected by the Fifth Amendment to the Constitution include the rights "to possess, use and dispose" of private property. *Loretto v. TelePrompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982); *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). Ranching, farming and building fences and houses are common and historic uses of private property which cannot be infringed or destroyed by government with impunity. "The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition. . ." *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003, 1031 (1992). *See also Dolan v. City of Tigard*, 512 U.S. 374 (1994). Yet the application of the Section 9 "take" provision to development on non-federal land, such as the county hospital at issue in the case at bar, often allows the government to do just that by depriving individuals of the right to make normal and common uses of their land, without just compensation.

This Court has left no doubt that regulatory schemes, no matter how laudable, which result in the taking of private property must be compensated. As Justice Oliver Wendell Holmes warned back in 1922: "[W]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

CONCLUSION

Application of the ESA in this case demonstrates the inherent conflict between the use of the ESA as a *de facto* federal land use planning law and the overriding goal of the Constitution, namely, the creation of a system of governance balanced between the federal and state governments. Accordingly, *amici curiae* hereby respectfully urge this Court to grant the petition for a Writ of Certiorari and resolve this significant constitutional conflict.

Respectfully submitted,

Nancie G. Marzulla
Christopher J. Oberst
DEFENDERS OF
PROPERTY RIGHTS
1350 Connecticut Ave., N.W.
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April 6, 1998

APPENDIX

Exhibit A

United States Department of the Interior
FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Marge Krueger
6208 Shadow Mountain Drive
Austin, Texas 78731

Dear Ms. Krueger:

This responds to our telephone conversation of June 7, 1993, requesting that this office reevaluate the following property for its suitability as habitat for federally listed threatened or endangered species:

> Lot in Jester Point, Phase I, or 7101 Foxtree Cove, Austin, Travis County, Texas

We have reviewed the information you provided as well as other available information concerning the potential of the above property to provide suitable habitat for the federally listed endangered golden-cheeked warbler, black-capped vireo and cave invertebrates.

We believe this property would be suitable habitat for the federal listed endangered golden-cheeked warbler and/or the cave invertebrates. We believe that clearing or development-related activities of this acreage would constitute a "take" as defined by Endangered Species Act (Act). The Act prohibits the "take" of a

federally listed species unless the "take" is incidental to an otherwise lawful activity and a section 10(a)(1)(B) permit under the Act has been obtained. Therefore, our biological evaluation of development on the subject lot and compliance with the Act remains unchanged.

We appreciate your concern for endangered species and your desire to comply with the Endangered Species Act. This response is intended to assist you in such compliance. You are ultimately responsible for compliance with all laws, and this letter does not exempt you from complying with current or future federal, state, regional, or local development requirements. If you wish to discuss this further, please contact Alma Barrera at 512-482-5436.

Sincerely,

[s/]Sam D. Hamilton
Sam D. Hamilton
State Administrator

Exhibit B

United States Department of the Interior
FISH AND WILDLIFE SERVICE
611 E. Sixth Street
Grant Bldg., Suite 407
Austin, Texas 78701

Jul 09 1992

Lee Sherrod
Horizon Environmental Services, Inc.
P.O. Box 162017
Austin, Texas 78716

Dear Mr. Sherrod:

By letter dated May 12, 1992, you requested a re-evaluation of our previous position on the Foxtree Cove portion of Jester Estates in Austin, Travis County, Texas. Enclosed with your letter was information relating to golden-cheeked warbler sightings in 1991 and 1992.

We previously indicated in letters dated July 16, 1990, June 21, 1991, and July 25, 1991, that development of houses along Foxtree Cove could require authorization under the Endangered Species Act. This position was based upon the identification of golden-cheeked warblers in the canyon on both sides of Foxtree Cove and that current biological information indicates that urbanization adversely impacts use of an area by this species.

The information in your letter did not provide new biological information regarding development impacts on or use of the area by the golden-cheeked warbler. It reconfirmed the use of the canyons adjacent to Foxtree Cove by this species. Therefore,

our original position, that authorization under the Endangered Species Act would be required, remains unchanged.

If you have any questions regarding this response, please contact Joe Johnston at (512) 482-5436.

Sincerely,

[s/]Sam D. Hamilton
Sam D. Hamilton
State Adminstrator

Exhibit C

United States Department of the Interior
FISH AND WILDLIFE SERVICE
3100 University Blvd. South
Suite 120
Jacksonville, Florida 32216
[MAY 13 1993]

CERTIFIED MAIL

Curtis W. Merriman
319 East Main Street
Avon Park, FL 33825

Dear Mr. Merriman:

This letter is regarding ongoing land-clearing activity taking place at River Ridge Ranches, Inc., bordered on the west by Highway 64 and on the south by Laflam Road, in Highlands County. This and any planned clearing activities have the potential to impact Florida scrub jays. These birds are federally listed as threatened, and any land-clearing activity may result in incidental take of the species. Any activities at this site must be stopped immediately.

In accordance with the Endangered Species Act of 1973, as amended (Act), only two avenues are available to legally "take" a listed species, such as the scrub jay. "Take," as defined in the Act, means "...to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." One avenue is through the Section 7 consultation process using the Incidental Take statement in the Biological Opinion. In order to use the Section 7 process, a Federal agency must be involved in the project. If a Federal agency is not involved, the other method available is obtaining a Section 10(a)(1)(B) permit by developing a Habitat Conservation Plan in

accordance with Section 10 of the Act. "Taking" a listed animal, such as the Florida scrub jay, without fulfilling the requirements of one of these two methods would violate the Act. I have enclosed copies of the Act and the Section 10 regulations for your information.

We recommend you contact Dawn Zattau, of my staff, to determine if "take" will result from you project. The number is 904-232-2580.

Sincerely yours,

[s/]David J. Wesley
David J. Wesley
Field Supervisor

Enclosures

Supreme Court, U.S.
FILED
MAY 20 1998
OFFICE OF THE CLERK

No. 97-1451

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE NATIONAL ASSOCIATION OF HOME BUILDERS OF THE UNITED STATES, THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, COUNTY OF SAN BERNARDINO, CITY OF COLTON and CITY OF FONTANA,

Petitioners,

v.

BRUCE BABBITT, SECRETARY, UNITED STATES DEPARTMENT OF THE INTERIOR and JAMIE RAPPAPORT CLARK, DIRECTOR, UNITED STATES FISH AND WILDLIFE SERVICE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF OF PETITIONERS

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The National Association of Home Builders of the United States, The Building Industry Legal Defense Foundation, County of San Bernardino, City of Colton and City of Fontana.

TABLE OF AUTHORITIES

CASES

Brzonkala v. Virginia Polytechnic Institute and State Univ., 132 F.3d 949 (4th Cir. 1997)..... 1

National Association of Home Builders v. Babbitt, 130 F.3d 1041 (D.C. Cir. 1997) 3

United States v. Lopez, 514 U.S. 549 (1995) ..... passim

REGULATIONS

50 C.F.R. §§ 17.11, 17.12 2

MISCELLANEOUS

59 Fed. Reg. 5820 (1994)..... 2

U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* (1994) 2

Petitioners file this reply brief in support of their petition for certiorari in order to clarify the issues before the Court.

I. Respondents argue that this case does not warrant review because petitioners have not identified any conflict among the circuits regarding the constitutionality of the Endangered Species Act or any other federal statute. Brief for the Respondents in Opposition ("Resp. Br.") at 11-14. However, respondents miss the larger import of the petition. As this Court has recognized, the boundary between federal and state authority is critical to our system of government and must be maintained. *United States v. Lopez,* 514 U.S. 549, 557 (1995). This Court is the final arbiter of where that boundary line is located and, ultimately, the final bulwark against undue federal encroachment on the sphere of state and local authority. The confusion among the federal courts over where to draw the boundary line – confusion that is documented in the petition and abundantly demonstrated by the lower court judges in this case – cries out for intervention by this Court.[1]

Moreover, the sphere of state authority has traditionally included the areas of criminal law and land use, both of which are implicated by federal regulation of

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[1] Petitioners note that one of the decisions cited in their petition, *Brzonkala v. Virginia Polytechnic Institute and State Univ.*, 132 F.3d 949 (4th Cir. 1997), has been withdrawn. The U.S. Court of Appeals for the Fourth Circuit has now heard the case *en banc* and a decision from the court is pending.

the take of endangered species such as the Delhi Sands flower-loving fly. Over a thousand species of animals and plants are now subject to federal authority under the Endangered Species Act, *see* 50 C.F.R. §§ 17.11, 17.12, and most of these species are found on non-federal lands totaling millions of acres. *See* U.S. General Accounting Office, *Endangered Species Act: Information on Species Protection on Nonfederal Lands* 4 (1994) (over 90 percent of listed species have some or all of their habitat on nonfederal lands); 59 Fed. Reg. 5820, 5827 (1994) (critical habitat designated for one species – the desert tortoise – includes over a million acres of private property). Thus, the proper boundary of federal authority to regulate land use based on the type of tenuous connections to interstate commerce present in this case is a question of first importance that should be decided by this Court.

II. It goes without saying that the Court's review is needed because the federal government has overstepped the bounds of its authority in this case and the lower court failed to step in, misconstruing this Court's decision in *Lopez* in the process. The respondents set forth essentially three arguments to support their assertion that the lower court was correct in its decision to uphold the assertion of federal authority in this case. None of these arguments is persuasive.

First, respondents argue that Judge Wald was correct in aggregating the effects on interstate commerce of all endangered species. Resp. Br. at 15-16. This argument has been answered effectively by the amici in support of petitioners, who point out that, under *Lopez*, aggregation is permissible only when the activity being regulated is economic in nature or is part of a larger

regulation of economic activity. Neither is true in this case. *See, e.g.*, Brief of Amici Curiae American Land Foundation and Texas Justice Foundation in Support of Petitioners at 6-9; Brief of Amici Curiae The Washington Legal Foundation and Allied Education Foundation in Support of Petitioners at 9-13.[2]

Second, the respondents appear to argue that, even if the Fly is considered on its own and not aggregated with other endangered species, the take of the Fly may still be regulated by the federal government because the Fly is purportedly an "article in commerce." Resp. Br. at 16. Respondents thereby appear to endorse the conclusion of the District Court that the take of the Fly can be regulated under Category Two of *Lopez*. This endorsement is surprising since the one point that Judge Wald, Judge Henderson and Judge Sentelle all agreed on was that this is not a Category Two case. *See* 130 F.3d at 1046 and 1062.[3]

Finally, the respondents argue that federal authority to regulate the taking of an endangered species is clear where the taking is incidental to commercial activity. As amici have convincingly demonstrated, this is a classic

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[2] Such aggregation of impacts is critical to the resolution of most challenges concerning the extent of federal authority under the Commerce Clause. Given that the Court did not have occasion in *Lopez* to address in detail the circumstances under which aggregation is appropriate, the Court's guidance on this issue is urgently needed.

[3] Respondents also appear to rely on the purported ability of Congress to regulate activities under the Commerce Clause based on the potential for future commerce. Judge Henderson and Judge Sentelle effectively disposed of this argument below. *See* 130 F.3d at 1058 and 1064.

case of putting the cart before the horse. *See, e.g.*, Brief Amicus Curiae of the American Farm Bureau Federation and California Farm Bureau Federation in Support of the Petition for a Writ of Certiorari at 8-10. A regulation cannot be justified on Commerce Clause grounds by looking to the effects on interstate commerce of the regulation itself, but rather must be justified by the interstate commerce impacts of the activity in the absence of the regulation.

CONCLUSION

Viewed in isolation, as the respondents would have this Court do, it may be hard for those not directly affected to get excited over a decision by the Fish and Wildlife Service which prohibits interfering with a few square miles of land which form the habitat of an endangered species. However, when viewed in terms of the reach of the Commerce Clause, it becomes clear that this case presents a major constitutional issue. The federal Endangered Species Act represents a laudable attempt to further a substantial governmental interest but the desire to do good is no substitute for the authority to do so.

This Court in *Lopez*, citing and quoting from earlier cases, made it clear that the original understanding and intent of the founding fathers – that the federal government is one of enumerated powers – are as true today as they were 200 years ago. This case provides the Court with a perfect opportunity to instruct the lower federal courts that even a law valid on its face may be beyond the power of Congress when it is applied in a particular setting. It provides a perfect opportunity to give federal judges the guidance they so desperately need precisely because the opinions of both the Court of

Appeals and the District Court show that the lower federal courts understand neither the letter nor the spirit of this Court's opinion in *Lopez*.

It is, in short, a cert-worthy case.

Respectfully submitted,

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Dated: May 20, 1998